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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK.

BY

SAMUEL JONES AND JAMES C. SPENCER,
REPORTERS OF THE COURT.

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VOL. XLVI.

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JUDGES

OF THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK,

DURING THE TIME OF THIS VOLUME OF REPORTS.

WILLIAM E. CURTIS,
CHIEF JUSTICE.*
JOHN SEDGWICK,
CHIEF JUSTICE.†
HOOPER C VAN VORST,
GILBERT M. SPEIR,
CHARLES F. SANFORD,
JOHN J. FREEDMAN,
HORACE RUSSELL,‡
JUSTICES.

---

* Died in Summer of 1880. See Memorial, page 583.

† *Vice* WILLIAM E. CURTIS, deceased.

‡ Apppointed to serve until January 1, 1881, in place of WILLIAM E. CURTIS, deceased.

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ERRATA.

The word "*not*" on last line of page 286 (Stevens *v.* Mayor), should be omitted.

In same case, page 297, names of respondent's attorneys should read, "*Townsend & Mahan.*"

In last paragraph of head-note to Hennequin *v.* Clews, page 331, "§ 720" should read "§ 723."

In Armitage *v.* Mace, page 551, last paragraph, "*ch.* 98, *Laws* 1872," should read "*ch.* 498, *Laws* 1872."

CASES ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK

AT GENERAL TERM.

BENJAMIN P. FAIRCHILD, RESPONDENT, *v.* THERESA LYNCH, APPELLANT.

Covenant to pay mortgage—construction of—effect thereon of purchase of the bond and mortgage by the mortgagor—Defense in the nature of matter of avoidance—when need not be set up in answer.

The mortgagor of certain premises conveyed the same by a deed containing the following clause: "Which said mortgage the party hereto of the *first* part hereby assumes and agrees to pay as part of the consideration hereinbefore expressed." *Held*, that this was the covenant of the party of the *second* part (Fairchild *v.* Lynch, 42 *Super. Ct.* 265).

Where the grantee covenants to pay a certain mortgage, as part of the consideration of the deed, &c., and his grantor, who is also the mortgagor and obligor, thereafter purchases the said bond and mortgage, the grantee is not liable on his said covenant;—this, though the bond and mortgage be subsequently transferred to third parties, and foreclosure proceedings instituted, in which the mortgagor is charged with and pays a deficiency. In such a case the mortgagor voluntarily extinguishes the personal liability on said mortgage, before there is any breach of the covenant, there being no equitable reason why it should be kept alive. Whether the pledge or mortgage of the lands could, in any event, be left, *quære;* but in this case it was disposed of by the foreclosure proceedings.

Statement of the Case.

The nature of covenants to pay mortgage, and what is sufficient to satisfy such covenants, considered.

Defendant is not precluded by subdivision 2, section 149 of the Code of Procedure (*Code Civ. Proc.* § 500, subd. 2), from resting upon a defense in the nature of matter of avoidance, which is not set up in the answer, when the facts upon which the defense is based are stated in the complaint.

Before SEDGWICK and VAN VORST, JJ.

Decided January 9, 1880.

Appeal from judgment, and from order denying motion for a new trial.

The facts are as follows: On February 17, 1873, the plaintiff made his bond, in the sum of $15,000, payable on February 15, 1875, to one Luyster, and to secure payment of the bond, mortgaged certain real estate. On February 18, 1873, the plaintiff conveyed to the defendant the mortgaged premises, subject to the mortgage. The conveyance contained the following covenant: "Which said mortgage the party hereto of the first part hereby assumes and agrees to pay, as part of the consideration hereinbefore expressed."

The complaint stated, and the proof was, that on February 20, 1873, this bond and mortgage were duly assigned by the said Luyster to the plaintiff.

Afterward the plaintiff assigned the bond and mortgage, and it finally went to certain persons, who, on September 23, 1874, began an action to foreclose the mortgage. The defendant had in the mean time conveyed the premises in fee, her grantee assuming the said bond and mortgage, and agreeing to pay it. The present plaintiff, and defendant, and the grantee of the latter were made parties defendant to the action in foreclosure, and in that action the complaint demanded judgment that, in case of a deficiency, they pay the amount of the deficiency. The defendant Lynch

answered in the foreclosure action, but after issue was joined consented that there should be judgment for the relief asked, except such part of the relief as demanded judgment against the defendant Lynch for any deficiency. There was a deficiency, which was paid by the present plaintiff to the plaintiffs in the action in foreclosure. The present plaintiff brought this action for damages, from defendant's breach of her covenant to pay the mortgage.

John A. Bryan, for appellant, among other things, urged:—The assignment by Luyster, as mortgagee, back to the plaintiff, as mortgagor, of the bond and mortgage which constituted the subject of the alleged covenant, was an extinguishment of the debt and a discharge of the lien. 1. The obligation to pay and the right to receive became united in the same person; thereby bringing the transaction under the category of "Confusion,"—one of the terms designated in the list of matters, which will discharge a contract (*Bouv. Law Dic.* tit. Discharge; *Id.* tit. Confusion). The rule is thus stated by BOUVIER: "When the qualities of debtor and creditor are united, in the same person, there arises a confusion of rights which extinguishes the two credits." 2. It is closely allied to the better known doctrine of Extinguishment (*Bouv. Law Dic.* tit. Extinguishment; *Bac. Abr.* same title). 3. The rule was announced, in 1807, by the supreme court of this State, in these words: "That a personal action once suspended, by the voluntary act of the party entitled to it, is forever gone and discharged, is a rule as well settled as any in the law" (Thomas *v.* Thompson, 2 *Johns.* 471, 473). The court there observes: "In order to determine when the suspension of the remedy works an extinguishment of the debt, HOLT, Ch. J., in the case of Wangford *v.* Wangford (1 *Salk.* 306), says, that when the same

hand is to receive that ought to pay, it amounts to an extinguishment" (2 *Johns*. 474). 4. Substantially the same rule was applied, in 1853, by the Supreme Court, in the Seventh District, Monroe General Term. There, a canal boat was the fund for the payment of notes; and the plaintiff became assignee of both the boat and notes. The notes were regarded as satisfied (Wayne *v.* Sherwood, 14 *Barb*. 633. See Nickles *v.* Dillaye, 15 *Hun*, 296, 301, and cases cited). 5. In the present case, the debt was the plaintiff's bond; the fund was his mortgage on the land; and the assignment to him of both, discharged the debt.

S. F. & F. H. Cowdrey, for respondent.

BY THE COURT.—SEDGWICK, J.—A former general term has held that the clause as to the assumption of the mortgage, in the deed from plaintiff to defendant, was the covenant of the party of the *second* part, the defendant herein.

I am, however, convinced that the assignment of the obligee and the mortgagee to the plaintiff, who was the obligor and mortgagor, extinguished any personal liability of the plaintiff upon the bond and mortgage. Upon that bond or mortgage resting in the hands of the plaintiff, there could be no action at law, "and then if a personal thing cannot be had but by action, if the action is extinguished the thing itself is extinguished" (*Plowd*. 184; Thomas *v.* Thompson, 2 *Johns*. 471, and the cases cited). The plaintiff voluntarily brought the personal obligation to an end before the defendant had committed any breach. All that could be left, if that could be, would be the pledge or mortgage of the land, and the foreclosure proceedings disposed of that in such a way that there is no practical question as to it in this case.

The plaintiff's sole cause of action is upon the

defendant's promise to pay the mortgage. The defendant cannot be held if there were no breach of that. The defendant's obligation was not to pay any specific sum, or the amount of the bond and mortgage; the covenant would be satisfied by any extinction of the bond or mortgage as to the plaintiff, by accord and satisfaction, or by release (Mills *v.* Watson, 31 *Super. Ct.* 374). The duty of the defendant became absolute for the first time, on the day fixed by the bond or mortgage for payment. Upon that day there was no personal liability of the plaintiff on the mortgage assumed by the covenant. The plaintiff had voluntarily extinguished it, when there was no equitable reason why it should be kept alive.

It does not seem that the foreclosure action involved this point at all. It might have arisen, if the liability of the defendant for the deficiency had been litigated, or could have been litigated, between these parties; but the question was taken out of the issues by the stipulation that there should be no judgment against the defendant here, for the amount of the deficiency.

It is insisted that the defendant cannot rest upon this defence, as the answer does not set it up. I do not think this necessary, when the facts on which the defence rests are stated in the complaint.

This view of the case is so fundamental, that it is not necessary to review the other exceptions in the case.

Judgment reversed, and new trial ordered, with costs of the appeal to the appellant, to abide the event.

VAN VORST, J., concurred.

Statement of the Case.

GEORGE T. NEWHALL, APPELLANT, v. WILLIAM H. APPLETON ET AL., RESPONDENTS.

New trial—when motion for must be made at special term—Jurisdiction —not conferred by appearance.

Section 1,002, Code of Civil Procedure, requires that in a case not specified in the three preceding sections, the motion for a new trial must be heard and determined at special term, in the first instance. A motion on the ground of surprise and newly-discovered evidence, must, under said section, be made at special term.

The appearance of the parties before the trial judge, and the argument of the motion on the merits alone, are not acts which confer jurisdiction.

If the question of jurisdiction is waived, it should appear by recitals in the order or in a stipulation to that effect.

Before CURTIS, Ch. J., and VAN VORST, J.

Decided February 2, 1880.

Plaintiff appeals from an order made at the trial term after judgment, and after the usual motion on the minutes had been argued and denied, granting defendants a new trial, on the alleged ground of surprise and newly-discovered evidence, set forth in affidavits in which an order to show cause at the trial term after judgment was obtained from the justice holding the term, after he had denied by formal order the motion made on the minutes.

Judgment was entered for $1,882.75, October 18, 1879, and the motion on the minutes, on all the usual grounds, having been argued and denied at the trial, a formal order of denial was entered October 24.

No appeal has been taken from this order, nor from the judgment; but the subsequent motion, returnable

October 24, being adjourned to November 19, 1879, the order was then made from which this appeal is taken.

Wm. W. Badger, for appellant.

Douglas Campbell, for respondents.

BY THE COURT.—CURTIS, Ch. J.—The question is raised, whether the judge who presided at the trial by a jury, can, after judgment, entertain a motion at the trial term for a new trial on the grounds of surprise and newly-discovered evidence.

Section 1002 of the Code of Civil Procedure requires that in a case not specified in the three preceding sections, a motion for a new trial must, in the first instance, be heard and decided at the special term. Motions for a new trial on the grounds of surprise, or newly-discovered evidence, are not specified in the three preceding sections, and consequently can only be heard at the special term.

The legislature having limited the jurisdiction to hear these classes of motions to the special term, the judge presiding at the trial term was without jurisdiction to hear this motion, unless such jurisdiction was conferred by the act of the parties.

There is some conflict in the affidavits submitted, as to whether this objection was taken at the hearing of the motion before the trial judge. Even if the parties had it in their power to give jurisdiction to the trial judge to hear and decide the motion, it should be shown by some act, or stipulation, or recital, in the order appealed from, so that such intention or arrangement should clearly appear, and not come before the court on appeal, to be disputed as a matter of fact.

There are intrinsic difficulties in giving a jurisdic-

tion to a judicial officer, from which he is limited by statute, and if it can be inferred, from a waiver to object in time, such waiver should not be in itself left, as a question of fact, to be determined from inferences, or conflicting proofs upon the hearing of the appeal.

The ruling of VAN VORST, J., in Argall *v.* Jacobs, 56 *How. Pr.* 167, confirms the view that the order appealed from was void for want of jurisdiction of the subject-matter in the judge holding the trial term after the judgment.

The appearance of the appellant before the trial judge, and arguing the motion on the merits alone, was not an act that could confer jurisdiction (People *v.* Marine Court, Court of Appeals, 3 *Abb. Pr.* 309).

No case is presented containing the evidence, or its substance, which is a requisite on an application for a new trial on the ground of newly-discovered evidence (Sproul *v.* Res. Ins. Co., 1 *Lans.* 71). Having come to the conclusion that the court was without jurisdiction to make the order appealed from, it is unnecessary to consider the case upon the merits.

The order appealed from should be reversed, but without costs to either party, the question being new.

VAN VORST, J., concurred.

THEOPHILUS MARSH ET AL., APPELLANTS, *v.* WEST, BRADLEY & CARY MANUFACTURING COMPANY, RESPONDENT.

Defense that amount due plaintiff is subject to lien of attachment—how pleaded—Motion for judgment for amount admitted by answer—when granted—appealability of order granting.

Opinion of the Court, by CURTIS, Ch. J.

An answer admitting a certain sum to be due by defendant, but alleging as a reason for non-payment that a third party has attached the indebtedness in an action against plaintiff, that said action "has since been pending," and that the defendant has never been released from its obligations by reason of such levy, is insufficient, and does not constitute a bar to the recovery of the amount, on motion, under section 511, Code of Civil Procedure. The answer should state that the said attachment and levy are still in force.

An order denying such a motion sufficiently involves the merits of the action and affects a substantial right, to be the subject of review by the general term.

Before CURTIS, Ch. J., and VAN VORST, J.

Decided February 2, 1880.

Appeal from an order of the special term of this court made in December, 1879, denying the plaintiffs' motion, that they have leave to enter judgment for $772.58 of their alleged claim, and that the action be severed, and they be at liberty to discontinue or proceed with the action as to the residue, under section 511 of the Code of Civil Procedure. Or that the defendant be directed to pay that sum into court, pursuant to section 717 of Code, on the ground that cause therefor is shown by the moving papers.

Stephen H. Olin, for appellants.

Francis C. Reed, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The answer admits that $772.58 of the claim in suit is due and owing; but states as a reason for not paying it to the plaintiffs, that a third party attached it, November 29, 1875, in a suit against the plaintiffs, and avers on information and belief, that such suit "has since been pending." The answer also further alleges that the defendant has never been released from its obligations by reason of such

levy. The answer fails to aver that this attachment is still in force. The allegation that the defendant has never been released from its obligations by reason of such levy, is not equivalent to an allegation that the levy is still in force. It may well be that no release of the levy has been executed, nor is any required to discharge the levy. The plaintiffs show that the attachment has been vacated by an order of the court, and this is not denied, or in any way controverted by the defendant. This defense is not of a character to constitute a bar to the plaintiffs' recovery of the $772.58 admitted by the answer to be due and payable to the plaintiff, except for the attachment.

The defendant claims that the appeal should be dismissed, on the ground that the order appealed from, denying plaintiffs' motion, is not appealable. The order made at special term sufficiently involves the merits of the action, and affects a substantial right, to warrant its revival at the general term.

The order appealed from should be reversed upon the pleadings alone, with costs, and an order entered directing judgment for the plaintiff, in the sum of $772.58; and in plaintiffs' election, for a continuance of the action, as to the other matters contained in the pleadings, pursuant to section 511 of the Code of Civil Procedure.

VAN VORST, J., concurred.

Opinion of the Court, by CURTIS, Ch. J.

JOHN LEHMAIER ET AL., RESPONDENTS AND APPELLANTS, *v.* ALMON W. GRISWOLD, APPELLANT AND RESPONDENT.

Supplementary proceedings—contempt in violation of injunction order—when not excused by informalities in affidavit, &c.

After the defendant has appeared and been examined in proceedings supplementary to execution, without objection, he is not in a position to justify himself when proceeded against for contempt in violating the order restraining him from disposing of his property, by allegations of informalities in the affidavit upon which the proceedings were based, nor to claim that the jurisdiction to which he has submitted, is avoided by such informalities; *a fortiori*, this is so when the defendant is an officer of the court.

In this case, the court held that the acts of defendant did not of themselves cause the loss to plaintiffs complained of, and therefore, that defendant should not be fined the full amount of the judgment, &c., as claimed by the plaintiffs.

Before CURTIS, Ch. J., VAN VORST and SPEIR, JJ.

Decided February 2, 1880.

Appeal by the defendant, from an order adjudging him guilty of contempt, and fining him $250.

Also appeal by the plaintiffs from the denial of their motion to fine the defendant for the amount of plaintiffs' judgment, with interest, costs and disbursements.

S. Kauffmann, attorney, and *George N. Sanders*, of counsel, for plaintiffs.

A. Heydenreich, attorney, and *Luther R. Marsh*, of counsel, for defendant.

BY THE COURT.—CURTIS, Ch. J.—The defendant having appeared, pursuant to the order for his exami-

nation in proceedings supplementary to execution, and having been examined thereunder, is not in a position to justify himself when proceeded against for contempt in violating the order of the court restraining him in the mean time from transferring or disposing of his property, by setting up informalities in the affidavit as an excuse for violating the order, or to claim that the jurisdiction to which he has submitted can be avoided by such informalities.

The orders of the court should be respected and obeyed by its officers. The excuse so often urged of ignorance that the act complained of was a violation of the order, is not presented by the defendant. No reason is apparent for questioning the discretion of the judge, in imposing the fine of $250 upon the defendant, and adjudicating him guilty of contempt.

The plaintiffs, however, insist that the judge erred in not imposing a fine upon the defendant for the amount of their loss. He justly considered that the execution of the second chattel mortgage, and the bill of sale, was in violation of the order of the court. He also held that the facts showed that the misconduct of the defendant in these respects did not of itself produce an actual injury to the plaintiffs, and that whatever prejudice accrued to them, arose out of their own dealings with the defendant, and out of a waiver of some of their rights subsequent to the commission of the contempt.

After a levy had been made under the plaintiffs' execution, upon property in the defendant's house, and while it was there held in the possession of the sheriff, the plaintiffs released the latter from all responsibility in allowing the property levied upon to remain in the defendant's house, and in withdrawing any keeper therefrom.

After the property levied upon had been thus withdrawn from the possession and custody of the sheriff,

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by this release on the part of the plaintiffs, one Brown, having chattel mortgages on the property, finding no keeper in charge, took possession of the property under a chattel mortgage executed before the levy, and assigned his mortgages, and transferred the possession of the property to a Mrs. Perry. The defendant seems to have had no part in these acts of Brown, but to have sought to dissuade him from taking possession of the property. If the plaintiffs had not requested the sheriff to permit the property to remain in defendant's house, and to withdraw any keeper in charge, and released the sheriff from responsibility for the safe keeping of the property, their levy would have been protected. The plaintiffs were prejudiced by their own acts and dealings with the defendant, and by their own waiver of rights. Their loss was not occasioned by the disobedience of the defendant to the order of the court.

The defendant was culpable, in executing the second chattel mortgage, the bill of sale and the lease; but these acts of his for which he is in contempt, and punished by a fine, are not the acts which caused the loss to the plaintiffs.

The orders appealed from, by the plaintiffs and defendant respectively, are affirmed with costs.

VAN VORST and SPEIR, JJ., concurred.

WILLIAM C. JOHNSON, RESPONDENT, *v.* JAMES I. BROOKS, IMPLEADED, ET AL., APPELLANTS.

Payment of money to be used in purchase of securities—when trust is created thereby—when delivery of securities will be decreed—Statute of frauds—Agency.

The plaintiff, as a subscriber with others, at the request of defendant Brooks, advanced a sum of money to the latter by payment to his

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agent, to be used for a specific purpose, viz.: in the purchase of a certain amount of stock and bonds of the Silver Islet Mining Company, for said subscribers, the plaintiff to receive a specified amount thereof.

In an action to compel the specific performance of an alleged contract to sell and deliver to plaintiff his said share of the securities in question,

The court held, that the facts proved raise a presumption that at the time the payment by plaintiff was made, said defendant's agent was authorized to receive it, and defendant was bound thereby; that upon the evidence, it appears that a trust was created, involving an obligation to use the funds for the purpose for which they were subscribed, which obligation the defendant cannot avoid by showing that he chose to use his own funds and purchase for himself; that the transaction is not avoided by the statute of frauds; and that the plaintiff is entitled to have from the stock and bonds in question the portion which fell to him, according to his subscription, a court of equity having power to administer the distribution of property impressed, as this is, with a trust.

Before CURTIS, Ch. J., and SPEIR, J.

Decided February 2, 1880.

Appeal by the defendant, James I. Brooks, from a judgment directing a transfer to the plaintiff of certain capital stock and bonds of "The Silver Islet Consolidated Mining and Land Company." The judgment was entered upon findings made by SEDGWICK, J., at special term.

The plaintiff sued to compel the specific performance of an alleged contract, to sell and deliver, under certain conditions, to the plaintiff, the bonds and stock above mentioned.

The plaintiff claimed that the defendants Brooks and Mifflin contracted with him, whereby he subscribed for the stock and bonds, and paid them three thousand dollars; that the same rapidly increased in value, and could not be easily purchased in the open market;

that a judgment in damages would be no adequate compensation; that the defendant Brooks had them under his control, in the custody of the defendant, The American Exchange National Bank, and that the defendant refused to deliver them.

These matters were put in issue by the answer.

William Henry Arnoux, for appellant.

Albert Stickney, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The case presents several exceptions, but none that call for a reversal of the judgment. The date of the telegram, and the testimony, especially of the defendant Brooks, that he was advised on the 26th of September of the additional subscription of $3,000 more, indicates that the finding that the plaintiff's agreement with the defendants, Brooks and Mifflin, was made on the 27th of September, should have been that the agreement was made on the day previous. It does not appear that this finding, as it stands, prejudices the respondent or the appellant, but it is apparently one of the errors which should be amended under section 721, subdivision 9 of the Code of Civil Procedure.

As regards the disposition of the appeal, the opinion of the judge at special term expresses the views which, after considering the case, we have arrived at.

It is as follows:

"SEDGWICK, J.—The relation between Mifflin and Brooks should be determined only to the extent that it is necessary for the determination of the plaintiffs' rights, under his transaction with Mifflin. If Mifflin were Brooks' agent in the matter, it is not material to find whether the agency arose from a partnership between them, or from a special or implied authority to obtain subscriptions.

"I find, as a matter of fact, that Brooks authorized

Mifflin to take subscriptions. I also find that such authority was ended by Brooks' telegram of September 28, in which were the words: 'Balance subscriptions too late; arranged otherwise.' Down to the receipt of that by Mifflin, he had authority to take the plaintiff's subscription.

"In view of the plaintiff's right to have his interest fixed, upon his payment of the money, Mifflin must be held to have received the $3,000 when it was paid at the bank in Newburyport, to which he had sent it for collection. The plaintiff paid it, he said, on Monday 'night.' This does not mean after dark, but in the latest hours of bank business, or in the afternoon.

"I do not mean to intimate that Mifflin was only a subordinate of Brooks. Their relations may have been mutual, and each on equal footing. It is not necessary to decide as to this, especially as there is an action between them.

"Mifflin being Brooks' agent, the latter was infected or chargeable with knowledge of what Mifflin did, and the obligation he incurred within the actual scope of the agency, and no farther.

"Mifflin did this, viz., he obtained a subscription of money, not upon a promise to return money, but to use it with other subscriptions in buying the stock in question. So far as subscribers were concerned, Brooks was to be the common agent for the purchase of the stock. He, too, was, as Mifflin was, a trustee for the subscribers.

"The subscriptions were placed with the parties under a trust and confidence, and not to establish the relations of debtor and creditor. I do not mean to decide that the consequences of this trust would not be affected by an implied understanding that the parties would not be held to purchase for the subscribers, if for any sufficient reason the funds subscribed could not

be used in that way, or by only the fact that a particular subscription was, without a breach of trust, in excess of the required amount. But the trust includes the general obligation to use the funds subscribed for the particular object.

"In my opinion it is not a sufficient reason to omit to purchase for a subscriber, that the agent or trustee chose to use his own funds. He is under an obligation not to do it; and at the least, if at any time before the purchase is consummated, the subscriber pays his money, and it is in the hands of another agent, with the constructive knowledge of the purchasing agent, when the latter consummates, he does it for the subscriber. Still more surely if he has actual knowledge.

"These considerations lead to the suggestions that up to the payment actually to Mifflin, the plaintiff here had no interest and was under no obligation, and that when he paid the money, he was not and did not intend to become himself a purchaser. He was placing money in the hands of another who was to purchase for him. If such other did purchase in his own name, but as agent or trustee for the plaintiff, the statutes of fraud in New York or Massachusetts do not avoid the transaction. The actual purchase in New York or Detroit was not void. An agent using his own name in the written contracts of purchase is bound to deliver to his principals (Tomlinson *v.* Miller, 7 *Abb. Pr. N. S.* 364; Dykers *v.* Townsend, 24 *N. Y.* 57, and many other like cases; Cobb *v.* Goodhue, 11 *Paige*, 110; Wain *v.* Warlters, 2 *Smith L. C.* 316, 6 Am. ed.).

"Brooks, as I understand the evidence, had made no valid contract for the purchase of the stock when he left New York for Detroit, and would not be able to consummate a purchase without subscribers. It is beyond doubt that up to and at and after the time of his making the contract in Detroit he contemplated the

necessity of Mifflin obtaining subscribers from persons unknown to him.

"On September 24 he wrote from New York: 'Get some new subscribers if possible; I have the Baker lot in view for $10,000;' and by telegraph on same day: 'Get all subscriptions possible.' On the 26th Mifflin telegraphs: 'Have placed $3,000 more; answer if right.'

"Instead of telegraphing answer, Brooks wrote by mail: 'I have your telegram asking about $3,000 more; I cannot give answer about that to-day, but will upon my return to New York or Boston.' On September 27 Brooks telegraphs to Mifflin: 'Remit $15,000, subject to my order on delivery of stock and bonds for Perkins and your account. This completes transaction.' This telegram was not a decisive statement that there were to be no more subscribers, for the day before he had said he could not give answer then, but would in New York or Boston. Mifflin could not have received the letter, but it is important testimony that Mifflin had not made up his mind as to what was to be done with the $3,000 subscription or to revoke Brooks' authority to receive it.

"Up to the 28th, I believe, on the facts, Brooks had not prepared himself to stop Mifflin's subscriptions, even after an arrangement was made to which he testified very obscurely. Unless he made such an arrangement he would not be able to reject the $3,000.

"It is in evidence that the contract was made in Detroit, $5,000 had to be paid. His share of that would be $2,500. He 'borrowed part and got rest from New York' (his letter of September 26); the amount he got from New York was $3,000 and odd; of course the excess over $2,500 would have to be accounted for to the New York parties. That leaves $2,500 that had finally to be made either by subscription or some arrangement by which Brooks could furnish it; at first he believed it would have to be arranged for in

New York or Boston, as he said in his letter. But in consequence of something between himself and Darling, in Detroit, he was able to command this amount in Detroit. The amount he received, as I should judge, from a sale of some stock to Darling with some cash he had in his pocket, enabled him to take a fixed position as to the $3,000 subscription, but for some reason he did not wish to avow it. He did not avow it until the telegram of September 28th. 'Balance subscriptions too late; arranged otherwise.'

"The turning-point in the issue as to when the agency was ended, is the time when this telegram was received. Was it before or after the plaintiff paid his draft? There is no specific proof as to this. It does not appear when Mifflin received it. The plaintiff has proved enough to create the presumption of continuance of the agency down to the time of the payment.

"There is a presumption of some weight that Mifflin could not be guilty of the injustice, if not fraud to the plaintiff, of taking his money after receiving such a telegram. On these considerations, and the further consideration of the indecision and wavering of Brooks in regard to the subject-matter of the telegram, I am of the opinion that the burden of proof rests upon the defendant of showing when the agency was closed by a decisive and affirmative act on his part. It is to be observed that if the subscription was paid before the consummation of the purchase in New York, and at a time when Brooks was a party to the payment through his agent, Mifflin, it is not material that Brooks did not have actual knowledge of the payment.

"His obligation was as strong as that of a contract with plaintiff to have the knowledge. And again, if he allows the plaintiff to part with his money, and use that as one of his resources, meaning to fall back upon it, if it be for his own interest, he does virtually use the money.

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"It is seen from these observations that I do not deem the transaction to be the equivalent of a sale of stock from Brooks to the plaintiff. He was not dealt with as an owner selling stock, nor was he an owner of stock, nor did the arrangement contemplate the transfer of stock from Brooks to the plaintiff excepting nominally. Brooks was to use the funds in a purchase from the Detroit parties. It was not intended that the real title to the whole should first rest in Brooks, although it was contemplated that he should use his own name. His making the executory contract in Detroit did not make him owner. The consummation of it required the use of the subscribed funds. Before he became owner he made a legal arrangement, by which he was to act as agent or trustee for the subscribers in becoming nominal owner.

"In my view of the case, the assignment made by Brooks has no operation. It was not delivered to the assignee or to any one who is shown to have been authorized to act for her. But especially I think he had no title to the subject-matter involved in this action.

"I think that in any aspect of the case, whatever technical view is taken of it, that the plaintiff is entitled to have from the stock in question the amount which was to go to the subscribers severally, according to the amount of subscriptions, and that he is not confined to an action of conversion or of claim and delivery, but that a court of equity has a right to administer the distribution of property impressed as this is with a trust.

"The plaintiff should have judgment with costs. No allowance."

The judgment appealed from should be affirmed, with costs to the respondent.

SPEIR, J., concurred.

HUGH DILLON, RESPONDENT, *v.* THE SIXTH AVENUE R. R. CO., APPELLANT.

Reply—when irregular, if served without leave of court.

When the answer contains only new matter constituting a defense *by way of avoidance*, a reply put in without the direction of the court is irregular, and should be stricken out. Sections 516 and 517 of the Code of Civil Procedure should be construed together.

Before CURTIS, Ch. J., and SPEIR, J.

Decided February 2, 1880.

Appeal by the defendant from an order denying motion to strike out the plaintiff's reply.

D. M. Porter, for defendant.

Nelson Smith, for appellant.

The plaintiff sued to recover damages alleged to have been sustained through the defendant's negligence. The defendant set up as a distinct defense that the plaintiff had released the cause of action. The plaintiff replied that the release was obtained by fraud, and undue influence, and without consideration. The defendant moved to strike out the reply, on the ground that none is necessary or allowed. The court denied the motion without costs, as the question was new.

BY THE COURT.—CURTIS, Ch. J.—Section 516 of the Code of Civil Procedure provides that, "when an answer contains any new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter."

Section 517 provides that "a reply may contain two

or more distinct avoidances of the same defense or counter-claim." The reply containing avoidances referred to in this section, is the same reply that may be directed by the court in its discretion upon the defendant's application, as provided for in section 516. These two sections should be construed together. The reply in the present case was served without any application to the court for direction or leave to make it, so that it is not founded on any exercise of the discretion of the court, or on the application of the defendant, as required by these provisions of the Code.

The order appealed from should be reversed, but as the practice is new, it should be without costs, and the motion shotild have been granted also without costs.

SPEIR, J.—[Concurring.]—I also am of the opinion that the order be reversed. The reply was not required. Prior to the last amendment of the Code a reply to an answer was not necessary unless it sets up a counter-claim. Here there is no counter-claim. Before the last amendment to the Code the courts permitted the plaintiff to prove any matter in denial or avoidance of the answer when it sets up new matter. The two sections of the amended Code, 516 and 517, are only a codification of the decisions of the courts.

JOHN C. RUST, APPELLANT, *v.* CHARLES HAUSELT, IMPLEADED WITH HENRY RANCKE, RESPONDENT.[1]

I. REFERENCE, OTHER THAN OF ISSUES.

1. Report of referee.

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[1] Previous to the decision here reported, this case has been before the courts in various phases. See 41 *Super. Ct.* 467; 42 *Id.* 573; 43 *Id.* 571; 69 *N. Y.* 485; 76 *Id.* 614.

Statement of the Case.

(a) CONFIRMATION OF.

1. *Rule* 30. By force of the rule itself the report becomes absolute and confirmed, unless exceptions thereto are filed and served within eight days after service of notice of filing the report. *No order of confirmation, either upon motion or ex parte, is necessary.*

1. So held as to a reference to take and state an account.

(b) UNNECESSARY MOTION TO CONFIRM.

1. If, notwithstanding *no exceptions are filed*, a motion is made to confirm, which after opposition is granted, *an appeal* from the order of confirmation entered thereon *brings up nothing for review.*

(c) EXCEPTIONS, FILING NUNC PRO TUNC.

1. *Effect of.*

Although, after a motion to confirm has been heard and granted, exceptions are filed *nunc pro tunc*, yet *no benefit can result therefrom* on appeal from the order of confirmation.[1]

1. *To obtain any benefit* therefrom, there must be a rehearing of the motion upon the exceptions.

1. If such rehearing is had after an appeal from the original order, it would involve an abandonment of the appeal.

2. *Power to order.* The court has power to permit the filing of exceptions *nunc pro tunc, and to that end may make such disposition of an appeal* from an order confirming a report to which no exceptions were filed, as may be necessary to prevent a failure of justice.

II. REVERSAL OF JUDGMENT AND NEW TRIAL.

1. ACTION FOR AN ACCOUNTING, EFFECT OF REVERSAL IN.

(a) Where an action is brought for an accounting, and judgment is rendered dismissing the complaint on the ground that there has been an accounting by the defendant, which is binding and conclusive on the plaintiff, and adjudges that defendant recover for the amount found due him on such accounting, the effect of a reversal of such judgment is that *upon these facts appearing upon the trial, the plaintiff was entitled*

[1] This rule would probably not apply if, on the hearing of the motion, exceptions were, either by express or tacit consent, made orally, argued and passed on by the court, and these exceptions were subsequently reduced to writing and ordered to be filed *nunc pro tunc*, so that they might appear in the record.

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to an accounting, and to the payment of such sum as on such accounting he might be found entitled to.[1]

III. *Bona fide holder for value.*

1. Value parting, what is.

(*a*) PARTNERSHIP. SURRENDER OF CHATTEL MORTGAGE ON INDIVIDUAL PROPERTY, BROUGHT BY THE MORTGAGOR INTO THE FIRM, SUBJECT TO THE INCUMBRANCE.

1. Constitutes a valuable consideration for the firm's indorsements of notes given, on the surrender of the mortgage, by the mortgagor, for his individual debt secured thereby.

IV. *Chattel mortgage—not filed.*

1. VALIDITY OF, AS BETWEEN PARTNERS.

(*a*) An unfiled chattel mortgage *on property subsequently brought by the mortgagor into a firm* of which he becomes a member, as his proportion of the capital, *is not invalid as to the other partners* by reason of its non-filing.

The property comes into the concern impressed with the lien of the mortgage.

V. *Ratification.*

1. BY ONE PARTNER OF THE ACTS OF HIS COPARTNER.

(*a*) Where one partner, without the assent or knowledge of his copartner, gives to H. his own notes with the firm name in-

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[1] The language used by the court, considered by itself, would seem to justify the conclusion that such reversal would have no greater effect than that stated in the head-note. It undoubtedly would necessarily have such effect, but it does not seem to follow that such would be its only effect.

In view of the fact that there was, before this general term, evidence (not before the previous one), which, had it been before that general term (viz.: the oral evidence of H. set forth in the head-notes) might have led it to the same conclusion, as to the rights and liabilities of the assignee, to which this general term arrived, it is submitted that the above decision does not go to the extent of holding that where the reversal is on the ground that the accounting is not binding and conclusive because it charges against the plaintiff items with which he is not chargeable, and that the elimination of such items would result in a balance in plaintiff's favor, such reversal is not a decision to the effect that such items are improperly included, and must be eliminated, which is binding on the trial court on a new trial, the evidence being the same as that upon which the general term based its decision, whatever may be the power of a subsequent general term, to disapprove of, and overrule the decision of the former one.

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dorsed thereon by him, in payment for his individual debt, which is secured by a chattel mortgage made by him on his individual property, which property, subject to the mortgage, he had brought into the copartnership as his proportion of the capital, H. at the same time surrendering his chattel mortgage, and thereafter there is a transaction between the firm and H. as to some wire gauze, and thereafter the firm makes an assignment to H. for the benefit of creditors, and in the schedule of liabilities annexed thereto states its indebtedness to H. to be $3,000; and upon the evidence it appeared that there could not be so large a claim in favor of H., except upon the basis that the firm acknowledged its liability on the said indorsements; and it also appeared that upon that basis the claim in favor of H. would be much larger, unless the firm had received a credit in respect of the wire gauze; and H. testifies as follows:—"Q. In Ex. 1," being the schedule of indebtedness, "the firm indebtedness to you is stated at $3,000; state how that amount was arrived at? A. They owed me $6,000, and after deducting the wire gauze, they agreed that the balance should be $3,000. I accepted the assignment upon the schedule of liabilities handed me by Rancke & Rust, which included my debt at $3,000."

HELD,

A ratification of the act of the partner who gave the firm indorsement for his individual debt, and an adoption by the firm of the original claim against the individual partner as a firm obligation.

VI. ASSIGNEE IN TRUST FOR BENEFIT OF THE CREDITORS OF A FIRM.

1. ACCOUNTING.

(*a*) Action for, by one of the partners, against his copartner and the assignee.

1. RESULT OF ABOVE HOLDING AS TO RATIFICATION.

1. As between the parties to the action the assignee is entitled to charge against the assets of the firm said sum of $3,000, and is under no obligation to account for the proceeds or value of the gauze as part of the assigned estate.[1]

Before CURTIS, Ch. J., and VAN VORST and SPEIR, JJ.

Decided February 2, 1880.

[1] See Rust *v.* Hauselt (41 *Super. Ct.* 467).

Appellant's Points.

This action was brought to compel the defendant Hauselt to account, as assignee of the firm of Rancke & Rust, of which firm the plaintiff was a member. Upon a trial at special term the plaintiff's complaint was dismissed, and an affirmative judgment was rendered against him. This judgment was reversed at general term, and a new trial ordered. Upon appeal to the court of appeals, the decision of the general term was affirmed, and judgment absolute was rendered against the defendant. Upon the remittitur of the court of appeals being filed in this court, and judgment thereon being entered, an order of reference was made to William F. Shepard, Esq., counselor at law, to state the account, and to ascertain and determine the amount due the plaintiff.

The referee stated the account, and reported nothing due to the plaintiff, and the defendant moved at special term to confirm the report. No exceptions had been filed by the plaintiff to the report. The court confirmed the report. The order made states that the report was "confirmed in all things, it appearing that no exceptions had been filed to such report."

Whereupon the plaintiff appealed from the report of the referee and from the order confirming same. The plaintiff then moved at special term for leave to file exceptions, *nunc pro tunc*, which motion was denied, and the plaintiff thereupon appealed from such order.

Both appeals are now considered.

Dixon, Whitlock & Anderson, attorneys, and *John H. Bergen*, of counsel, for appellants, urged:—I. Rule 30 does not apply to the report of the referee in this case at all, and the judge at special term should have heard the motion on the merits. *a*. This reference was like one to take testimony and report with opinion, and on the coming in of the report, it was the

duty of the court to hear argument on the merits and render judgment. It was made under the provisions of section 194, *Code Civ. Pro. b.* No exceptions were necessary to such a report, but it was the duty of the court to decide upon the facts reported and the evidence. *c.* If exceptions were necessary, then the court should have allowed them in furtherance of justice. *d.* The court had power to allow the exceptions to be filed *nunc pro tunc*, and it should have done so (Douglass *v.* Douglass, 7 *Hun*, 272).

II. The court of appeals, in affirming the general term of this court, held that the plaintiff was entitled to judgment against the defendant; and the decision of the referee being made upon the same facts upon which this court at general term and the court of appeals had passed, is directly in the teeth of both of those decisions, and in effect overrules both this court at general term and the court of appeals. The court of appeals, by its judgment, determined that no error had been committed by the general term in granting a new trial, and thereupon rendered judgment absolute upon the right of the appellant (*Code Civ. Pro.* § 194). The opinion of the former general term showed that they passed upon all the questions of fact sought to be again raised before the referee, to wit: The indebtedness of the firm to Hauselt. The binding effect of the accounting and settlement between Rust and Rancke. The ownership of the wire gauze. All these were by that opinion decided in favor of plaintiff. The matters having thus been decided in favor of plaintiff, and defendant having chosen to appeal and give the usual stipulation, the decision of the court of appeals affirming that of the general term, in the absence of an opinion, must be deemed to be an affirmance in every respect, and their judgment must be in these respects a judgment absolute in favor of plaintiff, and upon the right of the defendant as appellant. These questions

should therefore have been treated by the referee as *res adjudicata.*

III. Upon the merits: It was proved and not contradicted that the defendant Hauselt was the assignee of the firm of Rancke & Rust. Under that assignment he received $13,000 in notes, which he collected in full. He also had in his possession, when the assignment was made to him, certain goods belonging to Rancke & Rust (wire gauze), which had been transferred to him by Rancke, without the knowledge or consent of Rust, in payment of an individual past due debt from Rancke to Hauselt, from which goods he subsequently realized net $1,986.86. Hauselt, as assignee, paid out in liquidation of all claims against the firm of Rancke & Rust, $11,235.32, thus leaving in his hands in cash:

Balance of amount realized from notes which he received under assignment, over and above amount of debts of firm, - -	$1,764.68
Also the net proceeds of the wire gauze, which was firm property, and for which he must account, - - - - - - -	1,986.86
	$3,751.54
From which he is entitled to deduct the amount the firm owed him, - - -	1,000.00
Leaving balance, - - - - - -	$2,751.54

To be accounted for by him as assignee, less his commission.

These facts are not disputed on this accounting, and yet in the face of this evidence and of these facts, the referee decided there is nothing due the plaintiff.

IV. The law is perfectly settled, that Hauselt is not entitled to hold the goods of the firm of Rancke & Rust, to pay the individual debt of one of the firm to him (St. Nicholas Nat. Bk. *v.* Savery, Gen. Term, Super.

Respondent's Points.

Ct., *Weekly Dig.* April, 1879, p. 67; also decision in this case at general term, which was affirmed in court of appeals).

V. The pretense of a chattel mortgage amounts to nothing, as it never had any validity; it was not filed, and Rust never knew there was such a thing in existence.

VI. Rancke's acts in transferring the wire gauze to Hauselt (which was firm property) in payment of his individual debt, and in giving him the indorsement of the firm for the same purpose, being without the knowledge of Rust, were void, and Hauselt must account for the gauze, and for the balance of the money in his hands, precisely the same as if no such transaction had ever taken place. *a.* Hauselt never got title to the wire gauze until he accepted the assignment. Until the execution and delivery of that instrument, the wire gauze was the property of the firm of Rancke & Rust, and they could have maintained replevin or trover for it. When the assignment was delivered, then the title to this gauze passed to Hauselt as assignee, and he must account for it in this action.

VII. The plaintiff is clearly entitled to a judgment in this action upon the undisputed facts, for $2,751.54, with interest, at least, from February 24, 1875, the date when the assignee turned over the claims to firm and settled his account, less the commissions of the assignee.

S. Kauffman, attorney, and *Lewis Sanders*, of counsel, for respondent, urged:—I. The order of July 24, 1879, is not appealable, being granted in default of exceptions. An order on default is not appealable; but if the order is appealable, Rule 30 of the supreme court, in terms, says, that "the report *shall become absolute, and in all things confirmed*" notwithstanding error appear upon the face of the referee's report.

(Opinion by DANIELS, J. Catlin *v.* Catlin, 4 *N. Y. Supr. Ct.* [*T. & C.*] 667). There is no error in the order appealed from, and it must be affirmed. The order is granted in default of exceptions, and is not appealable (Innes *v.* Purcell, 58 *N. Y.* 390).

II. *a.* The order of October 7, 1879, denying the motion for leave to serve exceptions to a report confirmed three months before, and from which confirmation an appeal was then pending, was discretionary with the court below, and involved no substantial right, and hence is not appealable. *b.* If appealable, there are no merits, unless a bald ignorance of law in the face of a direct motion to confirm the report, be meritorious. But if this court should grant the application, how will it affect the order confirming the report? As has been shown, that order is absolutely unassailable, and no attempt has been made to set it aside; this court will not make a useless order; it does not sit as a moot court.

III. Plaintiff has no case. The findings of fact are fully borne out by the testimony, and the opinion of the referee is of itself a conclusive argument in support of his conclusions of law.

IV. The only points at issue were what Ranke & Rust owed Hauselt at the date of their assignment to him. In their schedule of creditors they placed amount due Hauselt at $3,000. The evidence given by plaintiff to impeach his own account was improbable, and involved a fraud upon the other creditors. Mr. Hauselt's evidence supported the schedule of creditors, as made out by plaintiff's book-keeper, and in the absence of the books of Rancke & Rust, and of all explanation for their absence, the referee rightly concluded that the schedule was correct, that Mr. Hauselt was not party to a fraud, and that the debt was $3,000, and that the balance due by Rancke & Rust to defend-

ant was $1,764.68, and that upon an accounting, nothing is due from defendant to plaintiff.

V. The wire gauze claim is discussed by the referee, and the referee clearly shows: 1st. That the wire gauze was no part of the property assigned; and, 2d. That it is no part of the complaint, and consequently not referred to him to compute, because it is not in this action. This is so clear a proposition that a single test will dispose of it. Assume that Rancke wrongfully disposed of the wire gauze to Hauselt in payment of an antecedent private debt of Rancke, a demand by plaintiff for the wire gauze would be in trover, while the present action is for an account. If this had been stated in the complaint, it would have been a clear misjoinder of actions. Not being put in the complaint, there can be no recovery therefor, and plaintiff may still bring his action for the wire gauze, as the present judgment does not conclude him.

VI. The chattel mortgage. The recording of the chattel mortgage is to prevent fraud, and applies only to subsequent purchasers and mortgagees in good faith for value. It is not pretended that Rust became a purchaser from Rancke; and if it were, the evidence does not snpport it. The firm of Rancke & Rust had the benefit of the goods belonging to Hauselt under the chattel mortgage, and it is immaterial whether Rust consented or not, so long as this firm got the goods by means of the firm indorsement. The firm got the consideration for their indorsement.

VII. The referee was warranted in finding a ratification. Rancke told Hauselt that Rust consented to the indorsement. Hauselt says: "At the time the assignment was made, I received a schedule from Rancke & Rust of their liabilities. This is that schedule," marked Defendant's Exhibit No. 1. "I believe Mr. Rust was present when the assignment and Exhibit No. 1 were delivered to me. . . . In my assign-

ment account of Rancke & Rust no reference is made to the wire gauze or the $6,000." Q. In Exhibit No. 1 the firm indebtedness to you is stated at $3,000—state how that was arrived at? A. They owed me $6,000,—and after deducting the wire gauze, they agreed that the balance should be $3,000. "I accepted the assignment upon the schedule of liabilities handed me by Rancke & Rust, which included my debt at $3,000. I never agreed to, and never was requested to hold the wire gauze, or the proceeds thereof, as assignee." The referee, under this evidence —the larger portion entirely new evidence—could not have found otherwise than he did, when to find otherwise would be to make defendant a party to a fraud and a perjury. The referee chose to believe Hauselt, plaintiff's witness, and Rancke & Rust's schedule of liabilities, and the statement Rancke made when he gave the firm indorsement, and the firm got the goods. His decision accords with good morals and common sense. The orders should be affirmed.

BY THE COURT.—VAN VORST, J.—Rule 30 of the general rules of practice provides, that in references, other than for the trial of issues in an action, the referee's "report shall become absolute, and stand in all things confirmed, unless exceptions thereto are filed and served within eight days after service of the notice of filing same."

The reference in this case, which was not of the issues, but to state the accounts of the defendant, Hauselt, as assignee, and of his indebtedness to the plaintiff, is within the rule requiring exceptions to be filed, and none having been filed, the defendant was entitled to an order confirming the report. In fact, the report had become absolute by force of the rule itself.

The record shows no error in the order made at

special term, confirming the report. The merits of the report do not appear to have been at all considered.

The order confirming the report of the referee was made on July 24, and on July 31, the plaintiff appealed from the order. Thereafter he applied to the special term for leave to file his exceptions *nunc pro tunc*. Had the order been granted at that time, an appeal from the order of confirmation being then pending, it is not apparent how the appeal could be aided by exceptions thereafter filed, and which had not been in substance even considered on the motion to confirm. In order to have obtained the benefit of exceptions, filed in fact after the report had been confirmed, it would have been necessary to have obtained a rehearing of the original motion, which would have involved an abandonment of the appeal.

The grounds upon which the motion for leave to file exceptions *nunc pro tunc* was denied do not appear. The court had doubtless power, at a proper stage of the proceeding, to order the exceptions, which, through a misapprehension of the practice in such cases, had not been filed, to be filed *nunc pro tunc* (Douglass *v.* Douglass, 7 *Hun*, 272), and if the exigencies of the case even now require it, such disposition of these appeals might be made as to allow that to be done which would be necessary to prevent a failure of justice.

And this involves a consideration of the merits.

The referee by his report has stated the account, and has reported that the balance of moneys in the hands of the assignee, which he has fixed at $1,764.68, is not sufficient to pay the indebtedness due him from the assignors, irrespective of his commission. He has also reported that there is no sum or amount due from the defendant Hauselt to the plaintiff.

The report of the referee covers the matters which were committed to him for examination and determi-

nation. It is claimed on the behalf of the appellant that the referee erred in both of the conclusions at which he arrived, and which are above indicated.

It is urged that the referee has decided in opposition to the decision of this court (41 *Super. Ct.* 467) at general term, and to that of the court of appeals (76 *N. Y.* 614) in affirming the judgment of the general term.

We do not regard this point as well taken. By the original judgment rendered at the special term, it was decided that an accounting had been had by the defendant of his trust, for which reason the complaint was ordered to be dismissed. The judgment further awarded to the defendant Hauselt the sum of $1,881.08 against the plaintiff. This judgment was reversed. The effect of the reversal is that upon the facts appearing upon the trial, the assignors were entitled to an accounting from the assignee, and to the payment over of any of the assigned estate or property in his hands to which the plaintiff was entitled. That is what the plaintiff asked in his complaint, and the relief he in substance demanded.

That accounting the referee, appointed by the court, was ordered to take. Whether anything was due to the assignors or either of them, could only be ascertained by such accounting.

The principal objections urged by the appellant to the referee's report are his conclusion that the assignors were indebted to the assignee, at the time of the assignment, in the sum of $3,000, and to his refusal to hold that the defendant Hauselt should account in this action for certain merchandise, consisting of wire gauze, which had been delivered to him by one of the assignors previous to the dissolution of the firm, and before the assignment was made.

In disposing of these objections on the merits, certain facts are to be considered.

Before the copartnership between the plaintiff and

the defendant Rancke was formed, Rancke was indebted to the defendant Hauselt in the sum of $5,000. To secure this claim Rancke executed and delivered to Hauselt a chattel mortgage, covering merchandise owned by him individually.

Afterwards Rancke entered into partnership with the plaintiff, and brought into the concern, as his proportion of the capital stock, his merchandise, encumbered by this mortgage.

Afterwards, and before the assignment was made by the firm for the benefit of its creditors, the defendant Hauselt demanded from Rancke the payment of his claim, or the delivery of the goods covered by his mortgage. Rancke, to satisfy Hauselt, delivered to him his notes, indorsed in the name of his firm, for the amount of the debt, and Hauselt delivered up the chattel mortgage.

Hauselt claims that the firm's indorsement was at the time assented to, or has been since ratified by the plaintiff. He testifies that when the firm's indorsement was asked, Rancke replied that he would see Rust about it, and when he gave the notes said, "Mr. Rust said it was all right." The evidence of Hauselt is corroborated in this regard by that of his bookkeeper, the witness Wiegand. The defendant Rancke, upon the hearing before the referee, denied that he was authorized by his partner to indorse the note, and the plaintiff testified that he never knew of or assented to the indorsement by his firm. Afterwards, and before the assignment was made, a quantity of wire gauze, belonging to the firm of Rancke & Rust, was delivered by Rancke to the defendant Hauselt, with bills of sale therefor, executed in the firm name, on account of this indebtedness.

With the assignment, executed by the firm to the defendant Hauselt, for the benefit of their creditors, was delivered a schedule of their creditors, stating the

amounts due to each. In this schedule the debt due to the defendant Hauselt is stated to be $3,000.

The evidence does not justify so large a claim in favor of the defendant Hauselt, unless upon the basis that the firm acknowledged its liability on the indorsement made for Rancke's individual debt.

It is quite clear, that for such indorsement the firm received, through the surrender of the defendant's chattel mortgage, which was a lien upon the property covered thereby, a valuable consideration.

That mortgage, although void as to creditors, and subsequent purchasers in good faith, for the reason that it had not been filed, was nevertheless valid as to the mortgagor, and the merchandise of Rancke went into the concern impressed with its lien.

Although by the copartnership agreement these chattels became joint property, Rancke could not, by simply placing the goods in such new relation, he still remaining an owner and being in possession, deprive the mortgagee of his legal and equitable rights under his mortgage.

In finally adjusting the claim of the defendant Hauselt against the firm at the sum of $3,000, at which amount it is stated in the schedule, delivered with the assignment, there must have been some recognition of the transaction with respect to the wire gauze, the value of which must have been taken into account, in reducing the claim of the defendant, which had been increased to $6,000, to $3,000.

The defendant Hauselt testifies that at the time the assignment was made he received a schedule from the assignors, of their liabilities.

"Q. In Exhibit No. 1, the firm indebtedness to you is stated at $3,000; state how that amount was arrived at.

"A. They owed me $6,000, and after deducting the wire gauze, they agreed that the balance should be

$3,000. I accepted the assignment upon the schedule of liabilities handed me by Rancke & Rust, which included my debt at $3,000."

This amounts to a ratification of what had been theretofore done, and is an adoption of the original claim against Rancke, for which the firm indorsement had been given as a firm obligation.

It is to be observed that this particular transaction is not sought to be impeached by the complaint in this action, nor are the creditors of the firm concerned in this proceeding.

The complaint urges neither fraud nor mistake as a ground for relief against the assignment, or the statement of the claim in favor of Hauselt. The usual accounting from an assignee is asked for, upon the closing up of the trust.

As between these parties the amount of the debt, in favor of the defendant Hauselt, against Rancke & Rust, must be considered as the sum of $3,000. The assignors are estopped by their own action. With respect to it the parties must be left where they placed themselves. And that disposes of the question of the wire gauze sold to Hauselt before the assignment, and which was taken into account in adjusting the balance.

Amid the conflict in the evidence, it was for the referee to determine which of the witnesses he would believe, and we fail to see, in the result reached by him, any error in law, or any real injustice.

The orders appealed from are affirmed, with costs to respondent of one appeal.

CURTIS, Ch. J., and SPEIR, J., concurred.

Subsequent to the above decision various proceedings of interest were had at special term. On one of these Judge RUSSELL wrote an opinion in which a general review of the proceedings in the action is given.

In view of the interesting questions disposed of by Judge RUSSELL, and the fact that they grew out of the above disposition made of the

case by the general term, the reporters have thought proper, contrary to their usual practice, to report that special term decision in this connection.

AT SPECIAL TERM.

JOHN C. RUST *v.* CHARLES HAUSELT, IMPLEADED WITH HENRY RANCKE.

JUDGMENT ABSOLUTE, WITH COSTS, ORDERED BY COURT OF APPEALS. EFFECT OF.

1. *Action for an Accounting.* In such an action judgment was rendered at special term, adjudging that the complaint be dismissed on the ground that an accounting had already been had which was binding and conclusive on the plaintiff, and adjudging that defendant recover the balance found due him on said accounting. Plaintiff appealed to general term. The general term reversed the judgment and ordered a new trial. Defendant stipulated and appealed to the court of appeals. That court affirmed the decision of the general term and ordered judgment absolute for the plaintiff on the stipulation, with costs.
   1. DETERMINATION AS TO PLAINTIFF. Such order is a final determination that plaintiff is entitled to an accounting, and to the costs of the action.
   2. DETERMINATION AS AFFECTING DEFENDANT'S RIGHT TO COSTS, AND TO AN AFFIRMATIVE JUDGMENT FOR ANY BALANCE THAT MIGHT BE FOUND DUE HIM ON THE ACCOUNTING.
      1. *Costs of action:* he is not entitled to tax them.
      2. *Disbursements.* Referee's fees paid by defendant upon taking up the referee's report, made upon a reference ordered in and by the order, ordering, pursuant to the judgment of court of appeals, judgment absolute for plaintiff against the defendant, with costs, cannot be taxed by defendant as a disbursement.
      3. *Balance found due defendant on such reference.* Defendant cannot enter judgment therefor.
2. COSTS, MEANING OF, AS USED IN THE JUDGMENT OF THE COURT OF APPEALS.
   1. *Carries to the plaintiff* the general costs of the action from the beginning to the end, *except* such as, subsequent

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to the decision of the court of appeals, are specially adjudged to the defendant.

RESULT.

The costs which were specially adjudged to the defendant (which were less than the general costs in the action) were offset against the general costs, and judgment ordered for the plaintiff for the excess.

Before Russell, J., at Special Term, August 31, 1880.

Motion by defendant for leave to enter judgment upon a referee's report, and motion to offset costs, submitted by both parties; both motions being heard without notice, upon stipulation of counsel.

Edgar Whitlock, counsel for plaintiff.

Lewis Sanders, counsel for defendant.

HORACE RUSSELL, J.—The history of this case has been somewhat remarkable and complicated, and is, to that extent, at least, interesting. A statement of its history is necessary to an intelligent discussion of the questions involved in these motions.

The action was begun in April, 1875. The plaintiff, in his complaint, alleged that he and his copartner one Henry Rancke (who was made a defendant because he declined to unite with him as a plaintiff), on October 23, 1873, made an assignment to the defendant for the benefit of their creditors; that the defendant, with the assets of the firm, had discharged their debts and liabilities, and had remaining in his hands a considerable surplus; that Rancke had transferred his interest in such surplus to the plaintiff; demanded an accounting, and asked judgment upon such accounting that the defendant pay over to him the sum remaining in his hands.

The answer of the defendant admitted the assignment and the payment of the indebtedness of the firm of Rancke & Rust, except that due himself, but alleged

that the defendant had already rendered an account of his assignment, on which it appeared that the surplus remaining in his hands was not sufficient to discharge the indebtedness of the firm to himself. For a second defense he alleged that he had, before the beginning of the suit, stated to the plaintiff his account as such assignee, and that on such accounting the balance due him from the firm was $1,881, for which he asked judgment against the plaintiff, and against his co-defendant Rancke. The reply of the plaintiff denied the counter-claim.

The case was tried in November, 1875, before a judge without a jury, who dismissed the complaint and ordered judgment for the defendant Hauselt against the plaintiff Rust, and against his co-defendant Rancke, for the sum of $1,881.

On appeal to the general term, on May 8, 1876, the judgment of the special term was reversed. The judgment first entered upon such reversal did not direct a new trial (41 *Super. Ct.* 467).

The defendant Hauselt thereupon appealed to the court of appeals from the judgment of reversal, without giving the stipulation required by section 191 of the Code upon an appeal from a judgment ordering a new trial.

The court of appeals declined to hear the appeal unless the notice of appeal was amended by inserting such stipulation upon the argument. That being done, the court of appeals heard the argument, but dismissed the appeal on the ground that it was from a simple order of reversal from which no appeal would lie to that court (69 *N. Y.* 485). Thereupon, by stipulation of counsel, the order of this court, dated May 8, 1876, was so amended as to reverse the judgment of the special term and to order a new trial; and judgment to that effect was entered.

From this judgment the defendant Hauselt again

appealed to the court of appeals, giving in his notice of appeal the stipulation required by section 191 of the Code—that if the order for a new trial should be affirmed, judgment absolute should be rendered against him. At the March term of the court of appeals, in 1879, the order of the general term of the superior court was affirmed, and judgment absolute for the plaintiff on the stipulation, with costs, was ordered (76 *N. Y.* 614).

The judgment of the court of appeals was in due form made the judgment of the superior court. It was then, at a special term of this court, on March 29, 1879, ordered that the plaintiff John C. Rust have judgment absolute against the said defendant Charles Hauselt, with costs. It was further ordered that it be referred to a "referee to state the account and to ascertain and determine the sum or amount which was due from the defendant Charles Hauselt to the plaintiff John C. Rust, under the judgment of the court of appeals and the judgment of this court entered thereon."

The parties attended before the referee, who reported, July 8, 1879: "That the defendant Hauselt received under the assignment the sum of $13,000; that he paid to creditors of the firm $11,235.32, leaving a balance of $1,764.68; that the indebtedness of Charles Hauselt was recognized and stated in the statement of liabilities of said firm, furnished to him by said firm at the time of said assignment, to be the sum of $3,000; that all of said balance is not sufficient to pay the indebtedness due the said Hauselt from the said firm, irrespective of his commissions as assignee; that he has ascertained and reports that there is no sum or amount whatever due from the said defendant Charles Hauselt to the plaintiff John C. Rust."

The defendant took up and filed the referee's report and moved for its confirmation. No exceptions

to the report having been filed, it was confirmed, as of course, under Rule 30. An appeal from the order confirming the report was taken by the plaintiff. The general term affirmed the order. An appeal from this order of affirmance was dismissed by the court of appeals, June 10, 1880.

The defendant then attempted to tax the costs of the action. The clerk declined to tax his costs, on the ground that the costs had not been awarded to him. The court sustained the clerk's ruling. The defendant then attempted to tax, as his disbursements, the $80 paid the referee upon taking up his report. This was refused by the clerk, and Judge FREEDMAN, before whom the matter was taken, sustained the clerk, holding that disbursements followed costs, and that a party not entitled to costs was not entitled to tax disbursements.

Now the defendant seeks to enter an affirmative judgment against the plaintiff for the amount of the indebtedness of Rancke & Rust to him, stated in the computation of the referee as remaining unpaid after the application of all the moneys which came into his hands by virtue of the assignment.

The question then is whether, under the circumstances recited, the defendant is entitled to enter such judgment, and what costs the respective parties are entitled to.

The defendant claims substantially the same rights as if the reference ordered for the purpose of carrying out the order of the court of appeals giving the plaintiff judgment absolute, were an ordinary reference to hear, try and determine all the issues in the action, on the coming in of the report as to which he would be entitled, as a matter of course, to enter judgment.

There are two objections to this theory: In the first place, it was not such a reference, but a reference to state the accounts and to report what was due the

plaintiff. In the next place, the defendant's rights must now be considered with reference to his stipulation on appeal from the order granting a new trial to the court of appeals, and the determination of the court of appeals rendering judgment absolute against him.

What was the effect of that stipulation and judgment? Did it mean something or nothing? Could the defendant stipulate that judgment absolute should be rendered against him, and under such a judgment still enter an affirmative judgment for all that he originally claimed?

I think not. Any right which he had to the affirmative relief, claimed in his answer, was lost by the judgment of the court of appeals on his stipulation, so that when the case came back to the superior court, it stood in the same position as if there had been no answer interposed—at any rate, no answer asking for affirmative relief. The court might have taken the account, and, having ascertained that there was nothing due the plaintiff, ordered judgment for the plaintiff simply for costs, in conformity with the decision of the court of appeals. It chose, instead, to have the examination made by a referee, under its direction.

The defendant acquired no new rights by reason of the matter being sent to a referee. The referee was simply to perform an act for the court, mainly ministerial, whereupon, it became the duty of the court to enter a final judgment in conformity to the decision of the court of appeals.

There cannot be such a thing as a judgment absolute for the plaintiff, and a finding for defendant of a larger balance due him (Shufelt *v.* Rowley, 4 *Cow.* 58).

In Thompson *v.* Lumley (7 *Daly*, 74), which was an action for malicious prosecution, the complaint was dismissed at the trial. The general term reversed the judgment and ordered a new trial. The court of ap-

peals affirmed the order and ordered judgment absolute for the plaintiff, upon the usual stipulation. The case coming back to the common pleas, damages were assessed by a judge and petit jury. On the assessment of damages, Judge VAN BRUNT ruled that the plaintiff need give no evidence as to the payment of the sum of $700 costs and counsel fees, alleged in the complaint to be special damages, because the judgment of the court of appeals established that claim. Motion was made to vacate the assessment of damages, which was denied, and on the appeal from the order denying that motion, Chief Justice DALY said:

"The effect of the judgment of the court of appeals was the same as if the whole of the plaintiff's cause of action had been admitted. It was equivalent to an admission, by a failure to put in an answer, that the defendants had, maliciously and without probable cause, caused the plaintiff to be arrested, imprisoned and prosecuted upon a charge of perjury. But the amount paid for counsel fees and costs the plaintiff had to prove upon the assessment, for that was in no way settled by the judgment of the court of appeals, the effect of which was simply to establish the plaintiff's cause of action as averred in his complaint, but nothing more, and the ruling of the judge upon this point was, in my opinion, erroneous (p. 76). . . . As respects the assessment of damages in this case, it is to be regarded as analogous to a default upon a failure to answer, and to be governed by the practice which existed upon assessing damages upon an inquest at the circuit, or upon a writ of inquiry before a sheriff's jury" (p. 78).

What, then, is the effect of an admission by failure to answer? Clearly, that the plaintiff in an action is entitled to the relief demanded.

It would be an extraordinary thing for a defendant who did not answer, to get an affirmative judgment in the nature of a counter-claim.

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In Wright *v.* Delafield (25 *N. Y.* 266) the plaintiff brought his action to restrain the prosecution of actions pending against him on notes given for the purchase of land, on the ground of defective title, and prayed that the defendant might be required to make a good title and convey. There was a pure defense to the action, which prevailed. But the judge before whom the case was tried, without a jury, not only dismissed the complaint, but gave judgment for the defendant for the amount of the notes. The plaintiff appealed from this judgment, and it was reversed, because there was no claim in the defendant's answer for judgment upon the notes. SMITH, J., delivering the opinion of the court, said:

"The principle still remains that the judgment to be rendered by any court must be *secundum allegata et probata*, and this rule cannot be departed from without inextricable confusion, uncertainty and mischief in the administration of justice. Parties go to court to try the issues made by the pleadings, and courts have no right to make new issues for them on the trial, to their surprise or prejudice, or to find judgments on grounds not put in issue and distinctly and fairly litigated" (See also Kniffen *v.* McConnell, 30 *N. Y.* 285–290; Stephens *v.* Hall, 2 *Robt.* 674; Doyle *v.* Mulrein, 1 *Sweeney*, 517; Norbury *v.* Seeley, 4 *How. Pr.* 73; Glen Manufacturing Co. *v.* Hall, 6 *Lans.* 158).

The rendering of an affirmative judgment in favor of a party who had stipulated that judgment absolute should be rendered against him would be quite as improper as to render judgment in his favor for what his pleadings did not claim.

It is suggested that the case of People *v.* Denison, decided at the Albany special term in May last (*N. Y. Daily Register*, July 1), is an authority for the position here taken by the defendant. I think not. In that case the action was brought by the People to re-

cover certain sums of money alleged to have been overpaid to the defendants by fraudulent collusion with certain officers of the State government. The defense was a denial and a counter-claim. The referee reported in favor of the plaintiffs for the amount claimed. The general term reversed the judgment entered thereon and ordered a new trial. An appeal was taken by the attorney-general from the judgment and order of the general term to the court of appeals, the usual stipulation being given. The action of the general term was affirmed and judgment absolute for the defendants rendered. The judgment of the court of appeals having been made the judgment of the supreme court, the defendants, without any further action or order, entered judgment against the State for the amount of their counter-claim. Motion was made by the attorney-general to set aside this judgment. Judge WESTBROOK granted that motion—first, because a sovereign State which has never authorized the bringing of suits against itself in its own courts for the recovery of any debt or obligation supposed to be owing by it, but which has established a State board of audit for the purpose of hearing and deciding all private claims, cannot have a judgment rendered against it in the courts; second, because, even if such a judgment could be rendered at all, inasmuch as the counter-claim was not litigated or considered upon the trial before the referees, the defendants could not have judgment for the amount claimed without an assessment of damages pursuant to section 194 of the Code. Certainly this case cannot be an authority for the entry of judgment by a party who has stipulated that judgment absolute should be rendered against him.

In the Denison case, the defendant, in whose favor judgment absolute had been ordered, sought to enter judgment without having his damages assessed, and was forbidden.

In the case at bar, the defendant, against whom judgment absolute has been ordered, seeks, nevertheless, to enter judgment for all he ever claimed. This he cannot do.

The court of appeals, in affirming the judgment of the general term, and ordering a new trial, with judgment absolute for the plaintiff, said, "with costs."

I am of opinion that that judgment for costs carries the general costs of the action, from beginning to end, except the costs of the appeals taken by plaintiff from the order confirming the report of the referee, which were specially adjudged to the defendant Hauselt.

These costs should be offset against each other, and judgment should be entered for the plaintiff for the excess.

Statement of the Case.

At General Term.

In the Matter of the Petition of JOSÉ CARLOS TRACY, Petitioner, Appellant; Plaintiff, in action of AMSINCK and GOSSLER *v.* ROQUE HERNANDEZ and JOSÉ CARLOS TRACY, sued as JOSEPH C. TRACY, Respondents.

Jurisdiction of State Courts.

1. Public ministers members of a firm, the other members of which are not such.

(*a*) State courts have no jurisdiction over an action against the firm upon a firm liability.

1. *Non-service of summons* on the members who are public ministers : *effect of.*

1. This, although intentional, will not give jurisdiction over the action.

2. *Want of jurisdiction in such cases, how availed of.*

By petition of the public minister for an order dismissing the complaint.

Before Curtis, Ch. J., Van Vorst and Speir, JJ.

Decided February 2, 1880.

An action was brought by Gustav Amsinck and Gustav H. Gossler against two defendants, as partners under the firm name of Hernandez & Tracy, upon an indorsement, in their firm name, of a bill of exchange. The summons was served upon the defendant Hernandez only, notwithstanding the other defendant, Tracy, resides in the city of New York.

At the time of the commencement of the action, the defendant Tracy was, and still is, the *public minister*

of the *Republic of Peru* in the United States. Tracy presented his petition to the court, setting forth these facts, and moved for a dismissal of the complaint, on the ground that this court has no jurisdiction. The motion was denied, and an appeal was taken by the petitioner.

Luke A. Lockwood, attorney, and of counsel, for appellant:—I. This court has no jurisdiction. Paragraph 8 of section 711 of the United States Revised Statutes declares that the courts of the United States have exclusive jurisdiction of all suits or proceedings against ambassadors and other public ministers, &c. Section 687 places exclusive jurisdiction of such actions in the United States supreme court. Section 4,063 declares all writs and process whereby the goods, &c., of a public minister are seized or attached, void. Section 4,064 punishes by imprisonment and fine every person, party, or attorney or officer, who obtains or prosecutes or executes such writs.

II. Exemption from being sued in a State court cannot be renounced by a public minister, because it is not his personal privilege, but the right and privilege of the United States (Valerino *v.* Thompson, 7 *N. Y.* 576, and cases there cited. See Davis *v.* Packard, 7 *Pet.* 276).

III. The difficulty is not obviated by not serving the partner who is a public minister. The action is nevertheless against him, and the relief prayed for is a judgment against him; and the judgment to be entered in the action, under the State law, is against his joint property, and the execution to be issued thereon would be a violation of sections 4,063 and 4,064.

IV. The petitioner had a right, under the law of this State, being a defendant upon a joint contract, to appear and defend said action, notwithstanding he was

not served with a summons (Higgins *v.* Rockwell, 2 *Duer*, 650; Rogers *v.* McLean, 11 *Abb. Pr.* 440). But by reason of inability to waive his exemption by law, he properly applied by petition, respectfully bringing the fact of action brought, and no jurisdiction, to the knowledge of the court.

V. The court will dismiss such actions at any stage when the fact of no jurisdiction is brought to its knowledge (Valerino *v.* Thompson, 7 *N. Y.* 586; Taaks *v.* Schmidt, 19 *How. Pr.* 413; Griffin *v.* Dominques, 2 *Duer*, 658).

VI. The court has no jurisdiction in an action upon joint contract when one of the defendants is a public minister, consul, &c. (Valerino *v.* Thompson, *supra*; Naylor *v.* Hoffman, 22 *How. Pr.* 516; Rock River Bank *v.* Hoffman, 22 *Id.* 257).

VII. The order should be reversed with costs, and as the plaintiffs had due notice before suit brought, the complaint should be dismissed, with costs.

Martin & Smith, attorneys, and *Aaron Pennington Whitehead*, of counsel, for respondent:—I. The privilege which prohibits courts from exercising jurisdiction over foreign ministers duly accredited to the government of the United States, does not extend to their partners in business. The privilege is personal and is limited to the ambassador and his servants, and does not extend to others who happen to be connected by business ties; if it were otherwise, a foreign minister who happened to have a dozen partners might shield them all from the payment of their just debts by insisting on his privilege. No authority can be found which justifies the course taken by the petitioner. The privilege has never been extended, so far as counsel for the plaintiffs have been able to ascertain, beyond the foreign minister himself (4 *Blacks. Comm.*

254; Magdalena Co. *v.* Martin, 2 *E. & E.* 94; *Wheat.* 295; *Wheat.* [Lawrence ed.] 394). The mere fact that the petitioner is joined as a defendant in the action gives him no right to come in by a voluntary independent petition and endeavor to have the action dismissed as against his partner. The petitioner, although joined as a defendant, is not sued. No process has been served against him. No action can be said to be maintained against him until he is brought in by process. The petitioner is undisturbed in his person, and would not know that such an action existed unless so informed by the defendant Hernandez, and clearly he has no cause of complaint until the plaintiffs have endeavored to coerce him within the jurisdiction of the court.

II. The petitioner has no standing in court. There is no foundation for such a proceeding as he has initiated. His position is simply this. An action having been commenced against his partner, Hernandez, in which he is joined as a defendant, he chooses to come into court with another proceeding, and demands that the action be dismissed. Such a proceeding is unauthorized by the Code or by any practice. It is an unwarranted assumption for the petitioner to volunteer to come into court and demand that certain proceedings be dismissed upon his application. If he have any remedy, it must be in the action in which Hernandez has been sued. But these proceedings are in no way connected with the action. It is an attempt on the part of the petitioner to interfere with a process of this court, and to dictate to this court who shall and who shall not be sued. It is respectfully submitted that such a proceeding cannot be tolerated, and that it is without foundation in practice or precedent.

BY THE COURT.—VAN VORST, J.—The courts of the United States have jurisdiction, exclusive of the courts

of this State, of all suits or proceedings against ambassadors or other public ministers (*U. S. Rev. Stat.* §§ 687, 711, subd. 8).

Exemption from being sued in a State court cannot be renounced by a public minister, because it is not his personal privilege, but the right and privilege of the United States (Valerino *v.* Thompson, 7 *N. Y.* 576; Davis *v.* Packard, 7 *Pet.* 276; St. Luke's Hospital *v.* Barclay, 3 *Blatchf.* 259). The difficulty is not overcome by an intentional omission to serve, as is the case in this instance, the partner named as a defendant, who is a public minister. The action is, nevertheless, in substance against him; a judgment is demanded against the defendants, and, when entered, the judgment, under the laws of this State, may be enforced against property, which the defendant, not served, owns jointly with his co-defendant (Code, § 136).

Under the execution, which the plaintiff could issue and enforce upon such judgment, the goods and chattels of the defendant Tracy, owned by him jointly with his co-defendant, could be seized. Such execution would be a violation of the statutes of the United States (§§ 4,063, 4,064).

By reason of his inability to waive his exemption, the defendant cannot voluntarily appear and defend this action, as he might, but for this exemption.

In this condition, unless he can otherwise intervene, he may be subject to the hardship of seeing his goods sold to answer a claim against his firm, against which he may have a good defense.

It would seem, therefore, that the only remedy open to the defendant is to call the attention of the court to the subject by petition or motion, as he has done, and it is doubtless the duty of the court to dismiss an action of which it has no jurisdiction (Taaks *v.* Schmidt, 19 *How. Pr.* 413; Griffin *v.* Dominguez, 2 *Duer*, 656).

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The order appealed from is reversed, with costs and disbursements of this appeal.

CURTIS, Ch. J., and SPEIR, J., concurred.

HOWARD T. FELTON, APPELLANT, *v.* WILLIAM H. McCLAVE, RESPONDENT.

I. AGENT'S INTEREST IN AN AGENCY FOR A TERM OF YEARS.

1. Purchase of, provided principal's consent, *if necessary*, should be obtained.

(*a*) CONDITIONS PRECEDENT TO RECOVERY OF PURCHASE-MONEY.

1. That there should be *a valid subsisting contract*, whereby the vendor is constituted agent for the term.

(*a*) WHAT NOT SUCH CONTRACT. An instrument purporting to be a contract between a corporation and third parties, whereby the corporation agrees to and does employ the third parties as its agents for a specified period; but not signed by the president of the corporation, nor attested by its secretary, nor sealed with its corporate seal, and repudiated by the company; the instrument in the case at bar being signed "J. D. Culp, for the Consolidated Tobacco Company of California, by authority as per telegram hereto attached. This to be ratified and properly indorsed by officers of said company," and the telegram being "To J. D. Culp: You are authorized to close contracts for sale of our goods on terms desired, but official documents can follow if needed. I. N. Stow, President Consolidated Tobacco Co., Cal.;" does not constitute a valid, subsisting contract.

2. *Consent of the principal.*

WHAT NOT SUFFICIENT CONSENT. One consenting to a transfer of the agent's interest under a claimed contract, *but providing* that the consent was not to assume any recognition by the company of the existence of any such contract, or a similar provision, is not sufficient.

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II. CORPORATION.
1. Contract by.
(a) WHAT NOT VALID AND BINDING.
Supra.

Before CURTIS, Ch. J., and SPEIR, J.

Decided February 2, 1880.

The action is brought upon a contract made between the plaintiff and the defendant to recover $4,500 and interest, which the plaintiff claims to be due from defendant on a sale to him of one-half interest in a contract averred to have been made between the Consolidated Tobacco Company of California and the firm of William A. Park & Co., of which the plaintiff was a member, constituting that firm sole agent of the California Company.

The plaintiff alleges that said agreement between plaintiff and defendant was executed on September 11, 1874, and, in pursuance of the terms and conditions of said agreement, the plaintiff procured from the said Consolidated Tobacco Company and from William A. Park full written consent that defendant succeed to plaintiff's interest in said contract with said company, and the said William H. McClave, in part performance of said agreement to purchase, paid plaintiff on account of said purchase-money the sum of $100; that the plaintiff tendered an assignment of all of plaintiff's interest with the "Consolidated Tobacco Company," and defendant declined and refused to receive said assignment and declined to perform his agreement with the plaintiff.

The defendant answered that the plaintiff failed to obtain the company's consent, and so notified him, and that the agreement came to an end; that long afterwards the plaintiff professed to have obtained from the

company the necessary consent, but that, though requested, he failed to exhibit it, and the answer put the plaintiff's allegation at issue.

The complaint was, on motion of defendant's counsel, dismissed, and the plaintiff appeals.

G. S. Van Pelt, attorney, *Henry Daily, Jr.*, of counsel, for appellant.

Man & Parsons, attorneys, and *John E. Parsons*, of counsel, for respondent.

BY THE COURT.—SPEIR, J.—By the terms of the agreement between the plaintiff and defendant, it was a condition precedent to the performance of the contract by the defendant that the plaintiff should obtain the written consent of the Consolidated Tobacco Company and William A. Park, that defendant should succeed to the plaintiff's interest in the contract with said company. This is admitted by the plaintiff's counsel, and he asserts such written consent was obtained.

It is important to look at the contract between the Consolidated Company and William A. Park & Co., for the purpose of ascertaining what interest was involved in this consent. The contract was executed May 9, 1874, before the contract between the plaintiff and defendant was made, and it constituted William A. Park and the plaintiff Felton exclusive agents for five years for the sale throughout that portion of the United States lying east of the Rocky Mountains of nine-tenths of all the cigars and tobacco manufactured by the company. The first point presented is, did the California company execute the agreement alleged in the complaint to have been made between them and William A. Park and the plaintiff, appointing them such agents? It is set out in the complaint and pur-

ports in the attesting clause to have been signed by the president of the company, and its corporate seal to be affixed thereto and attested by its secretary. The signature to it and its execution was in fact only as follows:

"J. D. CULP,
"For the Consolidated Tobacco Company of California, by authority as per telegram hereto attached, this to be ratified and properly indorsed by officers of said company.
"WILLIAM A. PARK.,
H. T. FELTON."

"Signed and sealed in presence of
"HENRY C. STOW."

The telegram referred to is as follows:

"Received at Fifth Ave. Hotel, May 8.
"To J. D. CULP, Hoff. Ho.:
"You are authorized to close contract for sale of our goods on terms desired, but official documents can follow if needed. J. W. STOW,
"President Consolidated Tobacco Co., Cal."

There is no evidence in the case that the instrument signed by Culp ever was executed by the president of the company or attested by its secretary, or that the corporate seal was affixed thereto. What the plaintiff agreed to transfer was his half interest with his partner Park as sole agent of the company. Although the contract in terms runs "provided that the consent of the company, *if necessary*, should be obtained," it cannot be pretended it was unnecessary. Any other consent would be of no account unless it was a consent to transfer an interest in the agency. If there was no

agency, there could be no interest to be transferred. The contract, like others, is to be construed in accordance with the intent of the parties. The defendant was justified in believing that if the company was willing to take him in the place of the plaintiff he would become one-half interested in the agency upon paying $4,500, and his becoming such agent was the condition of the payment. It does not appear that Culp had any authority to execute such an agreement. Stow, by his telegram, did not undertake to give any such authority. The company having heard that the plaintiff's firm claimed to have a written contract with them, executed by Culp as its agent, wrote to the firm on the same day that the contract between the parties to the suit was executed, informing them that Culp had no authority to contract in behalf of the company, and that they had before notified them that the instrument referred to had been disapproved by the trustees.

It is apparent from all the evidence that the company at all times repudiated the agreement set up by the plaintiff between it and plaintiff's firm, and also the agency of Culp to contract for them; and further, that they did not recognize the existence of any contract binding the company to continue their agency. The learned judge properly dismissed the complaint upon the ground that the plaintiff had not procured any such consent as a preliminary step to his right to recover.

The consent that was given by the company, as testified to by the plaintiff and his witness Stow, did not even in terms amount to a consent. It contained in substance a provision that the giving of the consent was not to assume any recognition by the company of the existence of the contract claimed by the plaintiff to have been entered into. It was only a consent to the transfer of such right as the plaintiff might have, stat-

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ing that he had no right at all—a strong intimation that the defendant, after the transfer, would not be recognized as agent. In other words, the plaintiff, Felton, may make any arrangement with the defendant McClave to substitute him in his place as employee of the tobacco company. Nevertheless the company can say to him, you may transfer whatever right you have, but we will not permit you to be our agent to do our work.

The judgment should be affirmed, with costs.

CURTIS, Ch. J., concurred.

ROSE McDONALD, ADMINISTRATRIX, &c., RESPONDENT, *v.* CHARLES H. MALLORY, AND OTHERS, APPELLANTS.

Costs.

1. EXTRA ALLOWANCE.

(*a*) *On demurrer to complaint, when not grantable on.*

Where the court of appeals reverses a judgment of the general term in favor of the defendant on his demurrer to the complaint, and orders judgment for the plaintiff on the demurrer, with leave to the defendant to answer, on payment of costs, within a certain time, *an extra allowance cannot be granted within that time, so that the same shall become a part of the costs to be paid as a condition precedent to answering.*

Before CURTIS, Ch. J., and SPEIR, J.

Decided February 2, 1880.

A demurrer was interposed to the complaint, which was sustained by the special and general terms of the court, but overruled by the court of appeals, which ordered judgment for the plaintiff on the demurrer, with

leave to the defendants to answer on payment of costs within thirty days.

Before the expiration of the thirty days the plaintiff obtained an order at special term, which was opposed by the defendants, granting an extra allowance to the plaintiff of $150. The defendants appeal from the order.

Butler, Stillman & Hubbard, attorneys, and of counsel, for appellants:—I. Upon a decision and order overruling a demurrer to a complaint, where leave is granted to the unsuccessful defendants to answer over on payment of costs of the demurrer, and the decision does not work a discontinuance of the action or result in a final judgment terminating the action, but where the defendants proceed to answer under the leave granted and raise an issue for the trial term, no extra allowance should be granted. The case of Moulton *v.* Beecher (1 *Abb. New Cas.* 245), was a case where the plaintiff discontinued, and a small additional allowance was granted to the defendant as a condition of the discontinuance. The case of Lowry *v.* Inman (6 *Abb. Pr. N. S.* 394), was a case where leave was denied the plaintiff to amend and plead over, and a final judgment was entered in defendant's favor on the demurrer. The case of Small *v.* Ludlam (1 *Hilt.* 307), was a case where the plaintiff did not avail himself of the leave given him to amend, but appealed to the general term, and the defendant had final judgment. In all of these cases it will be seen that there was either a discontinuance, or leave to plead over was denied, or the party did not avail of such leave, and a final judgment was rendered on the demurrer, terminating the action. None of these conditions exist in the present case; there is no discontinuance or final judgment, but the defendants have leave to answer over on payment of

the usual costs of the demurrer, and they proceed to avail themselves of that leave and to serve their answer, and thus to raise an issue of fact for trial at the regular trial term of the court.

II. There is no practice prevailing either in this court or in the supreme court, sanctioning such an order as the one appealed from here. The usual and settled practice is to grant leave, where a demurrer has been interposed in good faith, to plead over on payment of the usual and ordinary costs of the demurrer, which are the costs of the action up to that time, and it is respectfully submitted that in a case like this no additional allowances should be granted, but that question should be left until the trial is had at the trial term.

III. It is quite settled that there cannot be two extra allowances granted in the same action (Brewer *v.* Brewer, 11 *Hun*, 147; Union Trust Co. *v.* Whiton, 17 *Id.* 593; Flynn *v.* Equitable Life Assurance Society, 18 *Id.* 213). And this being so, it is proper that the prevailing practice should not be disturbed and altered, but that the question of additional allowance should be left to the discretion of the justice presiding at the trial term when the case comes before him for trial upon the issues joined under the answer, and, if the plaintiff is successful, an extra allowance would, in a case like this, undoubtedly be granted. The question should, therefore, be left to the trial term, and not be entertained here now; especially where the terms of the privilege of answering over have already been stated and imposed by the court of appeals in its decision clearly and without any ambiguity. If this rule is changed, it will follow that this court will be repeatedly called upon to grant an allowance wherever a demurrer is overruled or sustained at special term, and if granted, thus preclude the party from applying for or obtaining an allowance on the trial, a change of prac-

tice which would invert the usual order of procedure, and which would be extraordinary and unnatural.

Benedict, Taft & Benedict, attorneys, and of counsel, for respondent:—I. The court has power to make the order. 1. The language of the Code is as follows: "In difficult and extraordinary cases (1) where a defense has been interposed, or (2) in such cases when a trial has been had, the court may, in its discretion, make a further allowance to any party not exceeding five per cent. upon the amount of recovery, or claims or subject-matter involved." *a.* Conceding the case to be difficult and extraordinary, the granting of an allowance was in the exercise of a sound discretion. *b.* A trial has been had. In Small *v.* Ludlow (1 *Hilt.* 307), and in Lowry *v.* Inman (6 *Abb. Pr. N. S.* 405), the argument of a demurrer was held to be a trial, and the successful party had an extra allowance. So in Moulton *v.* Beecher (1 *Abb. New Cas.* 193, 245), the argument of an unsuccessful demurrer was held to be a trial within section 309 of the Code of Procedure. 2. The court has the power to grant, and does grant, allowances in such cases where no trial has been had, viz.: on the overruling of a demurrer for frivolousness (First National Bank of Pittsburgh *v.* Bush, 47 *How. Pr.* 78); on the discontinuance of an action (*Id.*; Bartlett *v.* Lord, Supreme Court, 1st Dist., 1879; and see Carter *v.* Clark, 2 *Sweeny*, 188; Coffin *v.* Coke, 4 *Hun*, 616, and cases cited; Robins *v.* Gould, 1 *Abb. New. Cas.* 133). 3. It was urged on behalf of appellants that to entitle a party to an allowance final judgment must be had. But the Code provides for allowances not only on the amount of the recovery, but on the claim involved, and nowhere makes a final judgment a prerequisite to an allowance. But a final judgment has been had, so far as the issue which has been tried is concerned. The issue of law has been tried

and finally disposed of, and on that issue the plaintiff has recovered a judgment for costs. 4. The point was taken below, on behalf of the appellants, that but one allowance may be made in an action. We submit that the true statement of the proposition is, that but one allowance may be made on the trial of an issue; but that an allowance may be made on each separate trial of an issue, though in the same action. 5. The question, however, as to whether a further allowance may be made in the event of judgment for damages being finally recovered by plaintiff, though raised, was not considered below, and does not properly arise here, and need not be discussed.

BY THE COURT.—SPEIR, J.—The question presented by this appeal is whether the court has power to make the order appealed from.

The demurrer raised the point that a certain statute of this State has no operation on the high seas. It is not doubted that this case was difficult and extraordinary within the meaning of the Code. It received the most deliberate consideration, as appears from the able opinions which were delivered by both courts.

Although an additional allowance, when properly granted, becomes a part of the costs of the action awarded by the Code to the successful party (Commissioners of Pilots *v.* Spofford, 3 *Hun*, 57), it becomes a grave question whether it can be inferred that the court of appeals intended that an extra allowance should be included in the costs when a provision is made in its decision, that the defendant have leave to answer on payment of costs. This is not the *final* costs in the action, and is so determined by the court. The question then is presented, has the court the power to award an extra allowance in any case until the termination of the action. We have decided, this present term, that neither costs nor allowances can be awarded since the

adoption of the Code, unless authorized by law. The discretion to be exercised by the judges in the awarding of, and adjusting of costs and allowances must be limited and controlled by statutory authority. The cases are numerous which seem to justify an allowance when a plaintiff voluntarily submits to a nonsuit or discontinues after issue joined. A trial is not now a necessary element, when a defense has been interposed in a difficult and extraordinary case, nor is it deemed necessary that a judgment should be actually entered. The statute authorizes all these, and within the authority of the statute the courts may exercise their discretion. The test must be, that the action has terminated in such form that the successful party can lawfully claim the payment of the costs on such termination, and enforce their payment in any mode known to the practice. We know of no case, nor has any been furnished us, which does not come within this rule. If extra allowances can be made now, there can be no good reason why they should not again be allowed every time the court of last resort sends a case down for a new trial upon similar terms, and even in the same case. There cannot be two extra allowances granted in the same action, although the case may have been tried several times (Flynn *v.* Equitable Life Assurance Society, 18 *Hun*, 212). This furnishes a conclusive argument that extra allowances can only be made when the action is finally ended.

The order of the special term appealed from should be reversed, with costs.

CURTIS, Ch. J., concurred.

JAMES SHEEHAN, APPELLANT, v. GUSTAVE HUERSTEL, ADMINISTRATOR, ETC., RESPONDENT.

Costs in an Equity Action.

1. UNSUCCESSFUL ADMINISTRATOR-DEFENDANT.

(a) *Not entitled to, when.*

1. The court, upon adjudging that a fund in the hands of an administrator-defendant which he claims belongs to his decedent, in fact belongs to the plaintiff, and that neither the administrator nor his decedent has any interest therein, cannot *direct* the payment of the defendant's costs out of such fund.

Before CURTIS, Ch. J., and VAN VORST and SPIER, JJ.

Decided February 2, 1880.

George W. Wilson, attorney, and of counsel, for appellant.

Abraham Kling, attorney, and of counsel, for respondent.

BY THE COURT.—SPEIR, J.—This is an appeal from an order awarding costs to the defendant upon a judgment rendered by the court in favor of the plaintiff.

The action was brought by the plaintiff to have certain moneys declared to be his. The case was referred, and the referee gave judgment that the money was the exclusive property of the plaintiff, who was successful, and that the estate which the defendant represents as administrator has no interest in the fund. The defendant failed to recover, but on his application, the court awarded him costs to be paid out of the plaintiff's private fund. We are of the opinion that the court has no power to award costs to an unsuccessful defendant out of the private fund of a successful plaintiff. The cases in which the defendant may recover are

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where the defendant is not united in interest with those against whom the plaintiff recovers—when separate defenses are made by separate answers—and where costs may be awarded to the successful defendant (Allis *v.* Wheeler, 56 *N. Y.* 50; Park *v.* Spaulding, 10 *Hun*, 128). In the present case the fund from which the costs are to be paid, is no part of the estate, but is the exclusive property of the plaintiff. The instances above stated where costs may be allowed, are authorized by the Code, and the discretion of the court is to be exercised within the limitations of the law. This principle, we think, is applicable in cases of both law and equity. Mr. Justice MARVIN has said, in Downing *v.* Marshall (37 *N. Y.* 380), "It is equally clear that the court of chancery has no inherent jurisdiction to ordain and order costs independent of statutory authority."

The order appealed from should be reversed, with costs.

CURTIS, Ch. J., and VAN VORST, J., concurred.

HENRY A. ROGERS, RESPONDENT, *v.* THE SUN MUTUAL INSURANCE COMPANY, APPELLANT.

I. MARINE INSURANCE.

1. SEAWORTHINESS, WARRANTY OF.

(*a*) IMPLICATION OF. *The mere fact of effecting* the insurance, independently of the particular terms used, *impliedly warrants* that the vessel at the commencement of the voyage is seaworthy.

(*b*) EXTENT OF THE WARRANTY. That the material of which the vessel is made, its construction, the qualifications of the captain, the number and description of the crew, the tackle, sails, and rigging, stores, equipment and outfit generally, are such as to render it in every respect fit for, and able to encounter with

safety the ordinary perils of the proposed voyage or service. *It extends to qualities and defects of the vessel unknown, and that could not have been known, no less than those known, to the assured.*

(*c*) CONDITION PRECEDENT. This warranty is a condition precedent to *the policy attaching*, and the burden is on the assured to prove seaworthiness, whether the loss or injury proceeded from a want of it in any particular or not.

(*d*) WAIVER OR MODIFICATION OF THE WARRANTY.

1. *Burden of proof as to.*

It rests on the assured to establish.

2. WHAT WILL NOT OPERATE AS.

1. *Measures taken by the assurer*, such as having a survey made to satisfy himself as to the sea-worthiness of the vessel, will not of themselves so operate.

2. *Description of vessel in policy.* The fact that the vessel had been built for sound and inland navigation, that the assurer knew such fact, and that by the policy she was described as "the Steamboat *Novelty*," do not, as matter of law, restrict the implied warranty of general seaworthiness to a limited warranty of seaworthiness for sound and inland navigation.

II. APPLICATION OF ABOVE PRINCIPLES.

A vessel which had been built for sound and inland navigation, which fact was known to the assurer, was insured under the description of "the Steamboat *Novelty*," at and from Newark, New Jersey, to the St. John's River, Florida, with privilege of port or ports on the way. The assurer required that the vessel should be surveyed by an inspector in their employ, who should report on her condition to it, before it would accept the risk, and also required that the assured should pay the inspector's fee for making the survey. The inspector made the survey, and rated the vessel "A. 1½ for sound and inland navigation," but did not refer to a novel arrangement of the machinery, and the peculiar application of the propelling power, which, of itself, according to the opinion of some of the witnesses, rendered the vessel unseaworthy. After this report, the policy, dated November 2, 1876, was issued. The boat started from Newark, November 27, and lay at Clifton Dock, Staten Island, over night, leaving there to go down the bay on the morning of the 28th. When a little below and about a mile and a half from the Staten Island shore, she collided with a schooner coming up the bay. The collision broke a hole in the side of the *Novelty*, and she was run

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in towards the Staten Island shore, and beached about fifty yards out from the shore, her bow resting on the bottom and her stern swinging. On the 29th, a notice of abandonment was served on the assurer, which was not accepted.

HELD,

A charge that, as matter of law, there was under these facts a modification of the warranty of seaworthiness, and a *refusal to leave to the jury the question* whether there was, in point of fact, any waiver or modification, were erroneous.

1. IMMATERIAL ERROR.
   1. There being abundant evidence upon which the jury might have found a breach of the warranty, in case there was no waiver or modification, *the errors cannot be regarded as immaterial*, so as that the charge could be sustained, notwithstanding their commission.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided February 2, 1880.

Appeal by defendant from judgment entered upon the verdict of a jury, and from order denying motion for new trial.

On November 21, 1876, the defendant issued its policy, dated that day, to the Newark Transportation Company, in the sum of $10,000 upon the steamboat *Novelty*, insuring her at and from Newark, New Jersey, to the St. Johns River, Florida, with privilege of port or ports on the way.

On application being made for this insurance, the defendant's officers required that before accepting the risk one Captain Stuart should survey her and make report to them of her condition. Stuart was in their employment at an annual salary, as inspector of vessels in the port of New York. His salary did not cover the inspection of vessels out of this port, and they required the assured to pay Stuart's fee for making the survey, which he did. Stuart examined the boat and made a written report to the defendant of her character and condition, and gave oral information to the officers of

the company upon every point inquired about, as did Glover, the broker, who also examined the boat.

The boat started from Newark, November 27, and lay at Clifton docks, Staten Island, over night, leaving there to go down the bay on the morning of the 28th. When a little below there and about a mile and a half from the Staten Island shore, about noon of the 28th, she collided with a schooner coming up the bay, the stern of the schooner striking the bow of the *Novelty*. The collision broke a hole in the bow of the *Novelty*, and she was run in toward the Staten Island shore and beached about fifty yards out from the shore, her bow resting on the bottom and her stern swinging. On the 29th a notice of abandonment was served on the defendant, which was not accepted. The *Novelty* lay there until about February 12, 1877, when she was raised and put on the dock at Hunter's Point. Meanwhile, nothing had been done by her owners towards raising or saving her.

The claim on the policy was assigned to the plaintiff, and this action was brought, claiming a total loss, which is defended upon the following grounds, among others:

1. That the insurance was induced by false representations as to, and by concealment of facts respecting this boat, which were material to the risk, and that the policy was therefore void.

2. That the implied warranty of seaworthiness was not satisfied by the condition and character of this boat, and that, therefore, the policy never attached.

3. That by a regular survey, made under the rotten clause in the policy, she was "declared unseaworthy, by reason of her being unsound or rotten," and that, therefore, the insurers, by the express terms of the policy, were not liable.

4. That the cost of repairs, after making the deduction of one-third new for old, as provided in the policy,

would not exceed a moiety of her value as there stated, and that, therefore, by the terms of the policy, the loss was only a partial loss, and that the defendant, if liable at all, could be held liable for a partial loss only.

The trial extended from February 13 to February 21, 1879, when the jury rendered a verdict for the plaintiff for the full amount claimed, as for a total loss. A motion was made upon the judge's minutes that the verdict be set aside and a new trial granted upon the exceptions and for insufficient evidence, and because the verdict was for excessive damages and otherwise contrary to the evidence and contrary to law, which was denied, and the defendant duly excepted.

Judgment was entered for the amount of the verdict March 8, 1879, and the defendant duly appealed from the order, denying its motion, for a new trial and from the judgment.

Evarts, Southmayd & Choate, attorneys, and *Joseph H. Choate* and *Frederic B. Jennings*, of counsel, for the appellant.

Larned, Warren & Ethridge, attorneys, and *W. Z. Larned*, of counsel, for the respondent.

BY THE COURT.—FREEDMAN, J.—In a marine insurance, whether it be on the ship, freight, or cargo, or the commissions or profits to accrue upon the cargo, the assured is understood impliedly to warrant, by the mere fact of effecting the insurance, independently of the particular terms used, that the ship is at the commencement of the voyage seaworthy; namely, that the materials of which the ship is made, its construction, the qualifications of the captain, the number and description of the crew, the tackle, sails, and rigging, stores, equipment, and outfit, generally, are such as to

render it in every respect fit for the proposed voyage or service (1 *Phillips on Ins.* § 695, and cases cited).

This warranty extends to the qualities and defects of the vessel, unknown, and that could not have been known, no less than those known, to the assured (*Ib.*).

The warranty is a condition precedent to the policy attaching, and the burden is upon the plaintiff to prove seaworthiness, whether the loss or injury proceed from a want of it in any particular or not (Hazard *v.* New England Ins. Co., 8 *Pet.* 581).

The standard of seaworthiness varies at different places, and, in general, that must be taken which rules at the place where the vessel belongs. So, too, this standard varies according to the character of the vessel, her location, the voyage she is to undertake, or the service she is to perform. Thus, if she is in port, she may be seaworthy for that place, although not for sea. If on the ways for repair, she may be fit and sufficient for that condition, although she would not be fit to be waterborne. So, too, the insurance may be for a mere temporary purpose, as the going from one harbor to another, or even across a harbor or a strait, or a brief navigation upon inland waters, or while being safely launched; and, if the ship be sufficient for this purpose, it will not be necessary that she should be in a condition to go to sea (1 *Parsons on Marine Ins.* 386, 387, and cases cited).

Thus, in Cobb *v.* New England Mutual Marine Ins. Co. (6 *Gray*, 192), insurance was effected on a vessel when waterborne, at and from Perry, with permission to go to Eastport and thence to a southern place; and it was held that it was sufficient if the vessel was in a fit condition to go to Eastport while she sailed for that place, although she was not fit for sea.

The obligation may also be lessened, enlarged, superseded, or waived, by the parties. A vessel may be offered for insurance and insured that will not admit of

being put into that condition of seaworthiness for the intended voyage which is usual and requisite in ordinary cases.

But any such change or waiver must be clearly established. A survey of the ship by surveyors acting for the underwriters, preliminary to the agreement to insure, even when done in pursuance of an express standing regulation of the insurance company, is not a waiver on their part of their right to insist on the implied warranty of seaworthiness (1 *Phillips on Ins.* § 753, and cases cited).

Myers *v.* Girard Ins. Co. (26 *Penn. St.* 192), was an action on a policy of insurance on the iron hull stern-wheel steamboat *Governor Moorhead*, for one trip from Philadelphia to Port Washington, N. C. The boat was new, built in Philadelphia, and was to be taken to North Carolina to run on the Tar river as a passenger and mailboat. She proceeded down the Delaware river, but the steam got down, the furnace refused to draw, and she put in at Leedsburg, Morris river, and after an ineffectual attempt to make her machinery work properly, the captain took her back to Philadelphia, and, while at her berth at the wharf, during the same night, she sunk, and considerable damage was done. The witnesses all testified that she was not built for ocean navigation, but was adapted for river navigation, but were of the opinion that she could, with care, in favorable weather, be taken from Philadelphia to Port Washington. The company knew she was a river boat. One witness testified that he had surveyed her and communicated the facts as to the character of the boat and the trade she was intended for, to the secretary of the company, before the insurance. A nonsuit having been granted on the ground that she was unseaworthy, the supreme court, on appeal, held as follows, viz:

"We see no evidence from which an inference could

be drawn that the insurance was to stand good without reference to the ability of the steamboat to make the trip. It may be conceded that the insurance company knew that the boat was built for the river trade, and that it had been examined by the agent of the company before the insurance, but a waiver of the implied covenant of seaworthiness for the particular voyage insured does not follow from either of these circumstances, or both combined. All the authorities establish that a waiver of seaworthiness, when not expressed in the contract of insurance, is only to be inferred upon clear evidence that the insurer knew that the vessel was unfit to perform the voyage insured, or that a full representation was made by the assured of the defects of the ship before the completion of the contract.

"The assured is not bound to make any representation as to the condition of the vessel at the inception of the risk, for this is cured by the implied warranty of seaworthiness; but if he wishes to avoid the implied warranty by a disclosure of the defects, he must take care that the disclosure is full and complete. A mere statement that a vessel is intended for a particular trade, although that trade may be less hazardous than the voyage insured, will not cast the risk of seaworthiness upon the insurer; nor does it follow from an examination, that defects in the machinery of a steamboat were discovered and considered in the contract of insurance."

The rule clearly deducible from all the authorities is:

1. That it is competent for the underwriter to say, in effect, to the applicant for insurance: "You are or represent the owner of the vessel, who is bound to know all about her. For my own protection I shall look as far as I deem it expedient, but, after all, I shall rely upon the warranty of the seaworthiness of the ves-

sel to encounter with safety the ordinary perils of the voyage upon which you propose to send her;" and

2. That the burden of establishing a different contract rests upon the assured.

This rule may in some instances operate as a harsh one, but it is a reasonable and salutary one, and public policy is against its relaxation in favor of the owner, because upon its enforcement depends in a great degree the safety of the crew and passengers.

By the policy in question, dated November 21, 1876, and issued to the Newark Transportation Company, the defendant insured the steamboat *Novelty* at and from Newark, N. J., to the St. Johns River, Florida, with privilege of port or ports on the way. One of the clauses of the policy further provided that it should be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to the insurance.

Upon the trial the vessel was shown to have been built in 1869, at Philadelphia, to run by way of experiment, as a fast river boat. She had two high-pressure locomotive boilers, and engines of the locomotive type, two on each guard, which were adapted to the use of and required fresh water. The mode in which the power was applied to the wheels was novel and peculiar, and in the opinion of some of the witnesses, in itself, rendered her unseaworthy; and when she left on her voyage, she had only water enough for two days. The insurance was made upon a survey of Captain Stuart, which did not refer to this novel arrangement of the machinery and the peculiar application of the propelling power, but rated the vessel as "A, 1½, for sound and inland navigation." In making this survey Captain Stuart was shown and held to have acted as the agent of the assured, and not as the agent of the de-

fendant. The survey was not made a part of the policy, nor in any way therein referred to.

Nevertheless, the learned judge who presided at the trial, ruled that, as matter of law, the warranty of seaworthiness had been modified by the facts that the vessel had been built for sound and inland navigation, that the defendant had notice of it, and that by the policy she was described as "the steamboat *Novelty*;" and, entertaining these views, he refused, though specifically requested so to do, and against defendants' exception, to leave the question to the jury whether in point of fact there was any waiver or modification.

Under the principles and authorities already referred to, and in view of the fact that there was abundant evidence upon which the jury might have found a breach of the warranty in case there was no waiver or modification of it, this charge cannot be sustained.

The policy was for a voyage from Newark, N. J., to St. Johns River, Florida, with privilege of port or ports on the way. Under the privilege thus accorded it was not strictly necessary that the vessel, in point of construction, repairs, and equipment, should be seaworthy for the whole voyage as a continuous trip. The cases cited by the learned counsel for the defendant do not go to this extent, for Taylor *v.* Lowell (3 *Mass.* 331), and Merchants' Ins. Co. *v.* Clapp (11 *Pick.* 56), did not involve the question; in Fontaine *v.* Phœnix Ins. Co. (10 *Johns.* 58), there was no liberty clause; in Moses *v.* Sun Mutual Ins. Co. (1 *Duer*, 159), the decision was placed upon the ground that there was no evidence of any loss against which the defendants, by the just construction of the policy, undertook to indemnify the assured; and the view expressed in Kettell *v.* Wiggin (13 *Mass.* 67), that the vessel, insured from Gibraltar to the United States, with liberty to touch at the Cape de Verd Islands, should have been sufficiently found at Gibraltar to enable her to stay and load at the Isle

of May, without depending upon procuring provisions there, must be read in connection with the fact that the liberty clause in that case authorized the vessel to touch at said island for salt only.

The plaintiff was bound, however, to prove that the vessel, in point of construction, repairs and equipment, was in all respects competent, under the privilege accorded to her to use a port or ports on the way, to continue and complete the voyage so insured, and to encounter all the ordinary perils and dangers of it with safety. Upon his own showing it appeared that the proposed voyage ran along a dangerous coast, along which the gales are apt to be sudden and severe, and the sea is apt to get up high in a very short time, and the currents run with the wind, and that a vessel overtaken by a storm on certain parts of that coast is likely to find it difficult and hazardous to get into a harbor or inlet. It was for the dangers of such a voyage, inclusive of the risk incident thereto that in case of a storm the vessel might not be able to reach a harbor, that the vessel, in the absence of a waiver or modification, had been warranted seaworthy.

The description of the vessel in the policy as "the steamboat *Novelty*," is not of itself evidence of a partial waiver or modification of the warranty, nor does it become such evidence when taken in connection with the further fact that the vessel was built for sound and inland navigation, for notwithstanding the latter fact she might have been originally built so exceptionally strong as to be fit for the proposed voyage, or she might have been rendered sufficiently strong for the occasion. Nor is notice to, or knowledge in, the company sufficient *per se*. All these matters constituted only circumstances to be considered by the jury in connection with the other facts of the case bearing upon the same point. Upon the whole case the question of partial waiver or modification of the warranty was one of

fact, and it was error to take it from the jury, and to charge them that the obligation to prove seaworthiness was modified by the fact that she was known to have been built for sound and inland navigation, and that, except as to the engines, the Newark Transportation Company was only bound to make her equal in seaworthiness to the average of vessels navigating the Sound and inland waters.

As the error referred to necessitates a new trial, it is unnecessary to consider the other questions presented by the appeal.

The judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event.

CURTIS, Ch. J., concurred.

W. LEA ROBERTS, RESPONDENT, *v.* FRANK LESLIE, APPELLANT.

I. *Causes of action.*

1. ELECTION BETWEEN, COMPELLING.

(*a*) When a complaint contains *two causes of action, resting upon substantially the same facts*, in one of which the defendant is sought to be made liable in one character, and in the other in another character, a case is presented where a motion, made at the trial, to compel an election, should be granted.

1. *New trial on ground of refusal to grant the motion.*

As the granting or denying the motion rests, to a large extent, in the discretion of the trial judge, *a new trial will not be granted* for a particular exercise of that discretion, *unless* it clearly appears that the appellant was materially prejudiced by it.

1. *Material prejudice caused, when.*

When the number of plaintiff's claims is by him augmented, and thereby the issues enlarged beyond the real facts, and the claims themselves are of a

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character which show that defendant had no personal knowledge of them, and (even if an election had been compelled, as prayed for) the remaining claims would still have represented separate and distinct transactions, each having occurred at a different time, and involving a different amount, some of the transactions being renewals of preceding ones, and having to be traced back to their proper origin; but nevertheless being capable of classification under three distinct heads; a refusal to compel an election and a refusal to require the jury to answer specific questions as to each separate cause of action, coupled with a charge by which the jury was instructed to consider all the causes of action as so many independent claims, must necessarily have had the effect of greatly embarrassing the defendant in defending himself.

II. *Debtor, discharge of.*

1. By creditor dealing with securities.

(*a*) A loan was made by R. to L., at his request, upon promissory notes of third parties. Before they matured they were surrendered by R. to W., and in place of them R. took from W. a chattel mortgage on his property (which he afterwards foreclosed), and a policy of insurance on his life, in addition to a previous policy on his (W.'s) life, held by him, R. The loan was originally procured by W., acting as the agent of L., who, it was claimed, as such agent, indorsed the notes to R.; but at the time of the surrender of the notes, W.'s agency and his authority, whatever it may have previously been, had come to an end. The surrendered notes never came to defendant's hands.

Held,

that L. was discharged from liability, whether he be regarded as a loanee or as an indorser.

(*b*) R. held three notes made by one Williams to the order of L., and indorsed L. per Henry White. Henry White had been in the employ of L., and it was claimed that he had authority from L. to indorse these notes. After White had been discharged by L., R. came with these notes to L., who denied his liability. The matter was compromised by a renewal of the notes; two of the renewal notes L. indorsed unconditionally; the third he indorsed without recourse. When this third note came due it was not protested, but was taken up by Williams, he giving, in lieu of it, his note to the order of R. at three months.

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HELD,
L. was not liable upon, or by reason of, said third note.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided February 2, 1880.

Appeal from a judgment entered in favor of the plaintiff upon the verdict of a jury for $4,159.61, and from the order denying a motion for a new trial on the judge's minutes.

Thomas Darlington, attorney, and *Malcolm Campbell*, of counsel, for the appellant.

Sheldon & Brown, attorneys, and *D. C. Brown*, of counsel, for the respondent.

BY THE COURT.—FREEDMAN, J.—This is an appeal from the judgment, and from the order denying defendant's motion for a new trial.

The defendant, at the times mentioned in the complaint, and for several years prior thereto, was the publisher and proprietor of a number of illustrated journals published in the city of New York and containing advertisements.

Henry White, as an employee of the defendant had charge of the advertising department. He kept a bank account in his own name, to which all the collections for advertising were transferred, and every week he handed to the cashier of the defendant his check drawn against said account, and representing not the amount actually collected, but a certain round sum. A large proportion of the advertising was settled for by taking short notes from the advertisers, and these, White, for years prior to the time in question, had been in the habit of indorsing and getting discounted. Their proceeds he turned over weekly to the defendant in the manner stated.

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The plaintiff was on friendly terms with the defendant during that period. He visited him frequently both at his house and place of business, wrote for his publications, and received pay therefor. The only notice plaintiff ever gave to the defendant that he was doing this discount business, was in 1871, when he asked the defendant whether he was aware of that fact. The defendant answered that he was not, and knew of no occasion for it; but in conclusion he said: "So far as any paper given you through White is strict business paper, I will see it paid." There was evidence that for many years prior to 1874, White also received advertisements for papers other than those of the defendant, though he only canvassed or solicited for the defendant's papers, and that in consequence thereof he received notes which had no connection with defendant's business, and which he also got discounted in the same manner and through the same channels as defendant's business paper.

The plaintiff's claim against the defendant as pleaded, consists of fourteen distinct causes of action. Upon the trial it appeared that each of them was founded upon some transaction not with the defendant personally, but with White, and the question therefore in every instance was whether the particular transaction complained of occurred in the course of defendant's business as carried on through White, or whether it was an individual transaction on the part of White; or, in other words, whether or not White had authority, express, implied or apparent, to bind the defendant. It further appeared conclusively at the close of plaintiff's testimony, that the plaintiff in no aspect of the whole litigation had fourteen causes of action.

The eighth cause, pleaded as a loan, was shown to rest upon substantially the same facts which were re-

lied on to establish the first, in which the defendant was charged as indorsee of a promissory note.

So the second and seventh, the third and sixth, and the fourth and fifth, were respectively shown to have their foundation in substantially the same facts.

Defendant's counsel thereupon moved that the plaintiff be compelled to elect upon which he would rely, but the motion was denied and defendant duly excepted. The motion was renewed at the close of the testimony, on both sides, and again denied against defendant's exception. Defendant then requested that the jury be required to answer specific questions as to each separate cause of action, which request was refused, and to which refusal he excepted. The case was finally submitted to the jury under a charge by which they were instructed as to the necessity of proof on the part of the plaintiff as to the authority of White, but by which they were also instructed to consider the fourteen causes of action as so many independent claims, and under this charge the jury rendered a verdict for the plaintiff in the sum of $4,159.61.

Of this disposition of the issues the defendant may justly complain.

The style of pleading adopted by the plaintiff in this case is wholly unauthorized by the Code. Under the former practice the object of inserting two or more counts in one declaration, where there was in fact but one cause of action, was to guard against an insufficient statement of the case, where a doubt existed as to the proper mode of declaring, and to provide, if possible, against a variance between the pleadings and the proof on the trial. The Code, by providing that amendments for the correction of insufficient pleadings shall be liberally allowed, not only renders this practice unnecessary, but it expressly requires the pleading of a cause of action to be reduced to a plain and concise statement

of the facts constituting the cause of action, without unnecessary repetition. The plaintiff is no longer required to characterize his action by any particular appellation or averment. All he has to do is, to set forth the facts upon which he relies and let them speak for themselves, and this he is required to do without unnecessary repetition. The object is to secure singleness and unity in the issue.

The motion to compel an election should therefore have been granted, and in the submission of the remaining causes to the jury at least a proper classification should have been observed. But as these were matters resting, to a large extent, in the discretion of the trial judge, a new trial will not be granted for a particular exercise of that discretion, unless it clearly appears that the appellant was materially prejudiced by it. The case was a peculiar and difficult one to submit to a jury. It really should, by agreement of parties, have been tried by a referee. Not only had the plaintiff augmented the number of his claims, and thus enlarged the issues beyond the real fact, but the claims themselves were of a character which showed that the defendant had no personal knowledge concerning them. Even if an election had been compelled, as prayed for, the remaining claims, properly sifted, would still have represented separate and distinct transactions, each having occurred at a different time and involving a different amount. Some of these transactions were renewals of preceding ones, and they had to be traced back to their proper origin. They could have been classified, however, as follows:

1. Claims founded on commercial paper, on which White had used the signature "Frank Leslie, per Henry White;"

2. Claims founded on paper purporting, on its face, to represent individual transactions of White, and bearing only his individual name; and,

3. Claims founded on loans made to White.

The bare statement of these facts, without going farther, shows that the denial of the motion to compel an election, and the submission of the case to the jury in the manner in which it was submitted, must necessarily have had the effect of greatly embarrassing the defendant in defending himself.

But it is not necessary to dispose of the appeal solely upon that ground.

Defendant also moved at the close of plaintiff's evidence for a nonsuit as to each cause of action, and at the close of the whole testimony he moved for the direction of a verdict upon each cause in his favor, on the ground that the plaintiff had wholly failed to establish White's authority to bind the defendant in any of the transactions. These motions were denied, and the defendant duly excepted. The exceptions thus taken bring up for review the sufficiency, as matter of law, of the testimony adduced on the part of the plaintiff in support of each cause of action, and after a careful examination of such testimony I am of the opinion that the learned judge below erred, aside from the causes already referred to, in denying the motions as to the tenth, twelfth, and thirteenth.

The tenth cause, according to the complaint, is founded upon a loan of $1,895.54, alleged to have been made to the defendant, at his request, in 1874, upon certain promissory notes. The testimony shows that some of these notes were indorsed to the plaintiff, by White, in defendant's name, that others bore only the individual indorsement of White, and that before they matured they were surrendered by the plaintiff to White. This occurred after White had been discharged from defendant's employ, and his authority, whatever it may have previously been, had come to an end. The notes so surrendered never came to defendant's hands. In place of them the plaintiff took a

chattel mortgage on White's furniture, library, &c., for $2,000, which he afterwards foreclosed, and a policy of insurance on White's life for $2,000, in addition to a policy for a like amount then already held by him. This was a transaction wholly unauthorized by the defendant and in nowise connected with his business. If the defendant was liable either as indorser or as for a loan on the notes, he had a right to insist upon the preservation of his remedy over against the makers, which was lost by their surrender, and in consequence of which he was discharged. If he was not originally liable, he could not be made so by that transaction.

As to the twelfth cause: The complaint alleges a note by J. David Williams, and indorsed by the defendant, also protest and notice. The testimony shows that originally there were three notes by the same maker, payable to the order of Frank Leslie, and indorsed, "Frank Leslie, per Henry White." After the discharge of White, the plaintiff, with these notes and others, called upon the defendant, who denied his liability. The matter was compromised between them by a renewal of the notes, two of which the defendant indorsed unconditionally, and the third of which he indorsed "without recourse." The plaintiff accepted these renewals, and the twelfth cause of action is founded upon the note so indorsed without recourse. When that note became due, it was not protested, but was taken up by Williams, he giving in lieu of it his note to the order of the plaintiff at three months. This last note was the one admitted in evidence under exception. The plaintiff did not pretend to hold or own the one which the defendant had indorsed. If he did hold it, he could not recover on it, because the indorsement was without recourse, and even if that had not been the case, the defendant was discharged as indorser by the plaintiff's acceptance of the note of the maker on time.

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As to the thirteenth cause: This is founded upon a loan of $280, alleged to have been made to White, October 10, 1874, but is the same transaction set forth in the eleventh cause, as a loan of $243.60. The evidence in support of both these causes consists of a due bill dated October 10, 1874, and signed by Henry White in his individual name for $280, on account of notes to be delivered; which amount, on November 14, 1874, was reduced by a credit to $243.60.

It has also been urged that the testimony was clearly insufficient to carry the case to the jury as to the causes remaining to be considered; with the exception, however, of the first, second, third, fourth, and eleventh. But as the errors already noticed necessitate a new trial, because it cannot be ascertained with certainty how the verdict was made up, it is not necessary to decide the point or express any opinion upon it.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

CURTIS, Ch. J., concurred.

CHARLES A. CAMERON, RESPONDENT, *v.* THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE U. S., APPELLANT.

I. *Appeal from interlocutory judgment.*

1. DISMISSAL OF.

(*a*) After an appeal from a final judgment entered upon an interlocutory one (no appeal having previously been taken from the interlocutory judgment) had been dismissed, an appeal was, on December 4, 1879, taken from the interlocutory judgment which had been entered March 14, 1879. On motion this appeal was dismissed.

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H. *Final judgment entered on interlocutory one.*

1. OPENING SO AS TO PERMIT DEFENDANT TO ANSWER.

(*a*) Defendant had lost his right to review the interlocutory judgment by not properly appealing.

1. Motion to open final judgment and allow an answer on the ground that such right of review had been lost through mistake is denied.

Before CURTIS, Ch. J., and SPEIR, J.

Alexander & Green, for the appellant.

Grimball & Turnbull, for the respondent.

This action was brought for the conversion of an insurance policy. The defendant demurred to the plaintiff's complaint. The demurrer was overruled, and an order to that effect, giving leave to the defendant to answer, was entered September 10, 1878. Defendant did not answer, but appealed from this order overruling the demurrer. This appeal was, however, not immediately brought up. Subsequently the plaintiff moved for judgment, and thereupon, on March 14, 1879, a judgment for damages was entered, directing that the damages should be assessed by a sheriff's jury. The inquisition was taken, and upon it and the other proceedings, final judgment was entered by the clerk on March 31, 1879, for $5,625.96. From this final judgment the defendant appealed to the general term, and this appeal from the final judgment, and also the appeal from the order overruling the demurrer, were brought on for hearing at the general term of May, 1879.

The general term rendered a decision at the November term of 1879, dismissing the appeal from the order overruling the demurrer, and deciding that the appeal from the final judgment brought up nothing for review, as the notice of appeal contained no notice that any intermediate order or interlocutory judgment would be

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reviewed, and affirming the final judgment. Opinion by SPEIR, J. (45 *N. Y. Super. Ct.* 628).

Subsequently, on December 4, 1879, the defendant served a notice of appeal from the interlocutory judgment of March 14, 1879; and also made a motion at special term to set aside the final judgment and allow the defendant to answer, on the ground that by the mistake, inadvertence, and excusable neglect of the defendant's counsel, the defendant had lost his right of appeal. The judge, at special term, referred the parties to the general term. At the general term of this court, held in January, 1880, the appeal from the interlocutory judgment was heard, and also the motion of the defendant to set aside the final judgment on ground of mistake of counsel. The plaintiff, at the same general term, moved to dismiss the appeal from the interlocutory judgment.

Decision was rendered in March, 1880, denying the motion of the defendant, and dismissing the appeal from the interlocutory judgment.

No opinion written.

MARGARET SMITH, RESPONDENT, *v.* THE BRITISH AND NORTH AM. R. M. S. PACKET CO., APPELLANT.

Negligence—liability of carriers of passengers for—intervening causes of injury.

While the plaintiff, a passenger in one of defendant's ships, was lying in her berth, the tier of berths above suddenly gave way, and tilted down towards her, causing great noise and confusion; immediately after, and before she had recovered self-possession, the steward of the ship pulled her from the berth and tried to set her upon her feet; before she was free from his control and firmly

Opinion of the Court, by SEDGWICK, J.

on foot, the ship made a lurch which sent her along the floor, against the door on the other side, and back to the floor, thereby causing her severe injury. The negligence pleaded was the *defective construction of the berths.*

Held, that it was the duty of defendant, as a common carrier of passengers, to use the utmost care and foresight in the maintenance and construction of said berths; that the falling of said tier was presumptive evidence of negligence on defendant's part; that from the time of the falling thereof to the time of the injury of plaintiff, there was a continuous and connected series of occurrences induced or caused by the falling, and the plaintiff never having been placed in a position where she must herself bear the risk of the motion of the vessel, having been deprived of her bodily power to protect herself by the act of defendant's agent, the defendant is liable for the injuries so suffered by her.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal from judgment and from order denying motion for new trial. The action was for damages, for injury alleged to have been caused by the negligence of defendant to plaintiff, while she was a passenger on the defendant's steamer.

The facts appear in the opinion of the court.

Lord, Day & Lord, attorneys, *George D. Lord*, of counsel, for appellant.

Henry Stanton, for respondent.

BY THE COURT.—SEDGWICK, J.—The use of ordinary skill, and of materials of ordinary strength, would enable the builder of the structure that was meant to uphold the berths, to make it secure against the strains and shocks of a sea of not extraordinary violence. These means of this security being at the command of the owners of the steamship, the law presumes that there was negligence, when the berths fell. The circumstances did not appear to be extraordinary, and

the presumption is, that the proper means had not been used.

If these propositions may not be placed, although I think they may, upon common knowledge, the testimony of the skilled workmen shows that it would not have required unusual means to prevent an accident of the kind.

There being a presumption of negligence, the defendants were bound to show, by credible and conclusive testimony, that there was no negligence. I do not think they accomplished this. Their evidence as to the general plan, or the sections in general, may have been satisfactory enough, but there was no decisive evidence that this particular section was built in a proper way, or in accordance, in its details, with the general plan. It was not shown that the particular section had been suspected, before the accident. The carpenter and steward were dead, but that did not make it impossible to show by others, that the section had not been repaired in any part, and that its several parts still remained unbroken and secure. If the length of the platform made its bearing upon the runner secure, or if the runners had not been worn down, that could have been proved. It was at that point that there was a deficiency. If the platform were too short, and the runners broken, ordinary use would probably work the platform too much to one side, or a spring of the platform in ordinary use or from a sudden motion of the vessel, would bring the end of the platform outside of the runners. These were things that a jury should consider, and their verdict is conclusive.

The learned counsel for the appellants maintained, by an able argument, that the falling of the berths was not the proximate cause of the plaintiff's injuries. The counsel admitted that this point must be examined on the view of the facts most unfavorable to the defendants. The testimony allows this construction: the

plaintiff, while lying in her berth, was alarmed by the screams of women about her, and for the moment thought that the ship was going down. She did not immediately perceive what was the fact, that the platform above, that held five berths about two and one-half feet overhead, had been tilted down towards her. At once, before she had regained self-possession, the steerage steward pulled her out of her berth, and tried to set her on her feet. The counsel claims that the evidence incontrovertibly shows that he succeeded, and did set her so safely on her feet, and that she had complete control of her body. But the facts allowed the inference that she was not firm upon her feet, or free from the control of the steward, when the ship made a lurch or pitch that sent her along the floor against the door on the other side, from which she was thrown off to the floor. The only injury she received was from her being knocked against the door and the floor.

The argument is that the consequences of the falling of the berth had come to an end, and the plaintiff was in safety, when an independent set of acts began, and if the defendant might be responsible for the last, the complaint makes no claim of that kind. I am convinced that the facts of the case show that from the time the berth fell there was a continued and connected series of occurrences to the time of the injury, induced or caused by the falling. The plaintiffs being removed from the threatening situation, under the fallen berths—whether to place her in safety or for the purpose of setting the berths in order—was a natural and probable result of the falling berth, and from that time her position was the result of the negligence of defendant. She never was placed in a position where she must bear the risks of the motion of the vessel, for, by defendant's acts, she was deprived of her bodily power to protect herself. Her being, by the act of the defendant's agent, placed in a situation which exposed her to in-

jury, from matters for which, by themselves, the defendant would not be liable, is a legal ground of action (Sheridan *v.* Brooklyn City & N. R. R. Co., 36 *N. Y.* 39).

It is not denied that the law imposes upon the carrier of passengers the duty of carrying them safely, so far as human skill and foresight can go (Carroll *v.* Staten Isl. R. R. Co., 58 *N. Y.* 133), or to the utmost care and diligence of very cautious persons (Maverick *v.* Eighth Ave. R. R. Co., 36 *Id.* 381, and the cases there cited). It is claimed that this rule is applicable only to such portion of the carrier's arrangements or machinery as expose passengers to dangers peculiar to the voyage or passage, and not to such as involve dangers that the passenger would be exposed to, in ordinary situations, in the common affairs of life. In this, however, it is my judgment that the structure did expose passengers in berths to peculiar and unusual dangers. It was new in design, and intentionally planned by the defendants to increase their profits by holding a large number of sleeping people. The ordinary construction of beds or cots used on land was departed from, and in its stead loose and changeable parts were employed. This new plan was directly subject to the irregular motions of the ship and also to the unusual incidents of a number of people sleeping upon the berths. The court did not commit error, therefore, in charging "that it was the duty of the defendants to use the highest degree of care and skill, according to the nature of their business, in the providing of safe and suitable means of transportation and accommodation for these passengers, and in guarding against all injuries to them, from whatever cause, and which might naturally, and according to the usual course of things, be expected to occur."

The court did not charge that the defendants were liable for the injuries a passenger might suffer from the

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rolling and pitching of the ship. His charge was that if the negligence of defendants exposed the plaintiff to injury from the rolling and tossing, the defendants were liable. I think this is correct.

An examination of other exceptions show that they are not valid, but they do not require a detailed statement.

Judgment and order affirmed, with costs.

SPEIR and FREEDMAN, JJ., concurred.

SERAPIO ARTEAGA, APPELLANT, *v.* WILLIAM C. CONNER, SHERIFF, ET AL., RESPONDENTS.

Sheriff—liability of, as bail for defendant arrested in civil action—right to re-arrest defendant.—False imprisonment.

The provision of section 201, Code of Procedure, making the sheriff liable as bail for a party arrested in a civil action "if bail be not given *or justified*," must be construed as meaning, if bail be not given, *or do not justify as provided by the law and practice of the proceeding toward justification, provided in the foregoing sections.*

Consequently, if the plaintiff's attorney consent to a postponement of the justification of defendant's sureties, though for an indefinite time, the sheriff is not liable as bail, and has no right to re-arrest the defendant, until an actual default has been made by the sureties, and no mere lapse of time will give him this right. In case of such re-arrest, before default, proof of notice by the sheriff to the defendant that he would expect the undertaking to be approved of at once by the judge, on justification, or by the plaintiff's attorney, affords no defense to an action for false imprisonment, nor does ignorance of the existence of the stipulation postponing justification constitute a defense.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided April 5, 1880.

Appellant's Points.

Appeal from judgment entered upon the verdict of jury, in favor of defendants, as directed by the court.

The action was for damages for false imprisonment. In an action of Leitch against the present plaintiff, an order of arrest was made, and under it the present defendant, through his deputy, arrested the present plaintiff. The plaintiff, giving bail, was discharged by the sheriff.

The justification of the sureties was adjourned from time to time, by the consent of the attorneys of the parties in that action, until the attorneys for the then plaintiff consented, in writing, that the then defendant "have five days after the decision of the motion to vacate the order of arrest, within which to serve notice of justification." Some six months after this, no notice being served in the meantime, the deputy of the sheriff sent to the then defendant's attorneys notice that the bail must justify. On the trial it was considered that the sheriff received no answer to the notice, and was not informed of the true facts of the case. The sheriff assuming to be the bail of defendant, under section 201 of the Code of Procedure, arrested the present plaintiff and remanded him to the custody of the keeper of the common jail, who was made a defendant.

The court directed the jury to find for defendants, and the plaintiff excepted.

Nelson Smith & Leavitt, attorneys, and *John Brooks Leavitt*, of counsel, for appellant, urged, among other things: I. Whoever arrests a citizen, not only must do so under some legal authority, but always does so at the peril of any alleged authority being legal (Pratt *v.* Hill, 16 *Barb.* 303).

II. This arrest was made by virtue of section 201 of the Code, which provides that if the bail do not justify, the sheriff himself shall be liable as bail; and that

being so, the authorities are that the sheriff may, as bail, take and surrender the defendant in the action, without process (Metcalf *v.* Stryker, 31 *N. Y.* 255; Sartos *v.* Merceques, 9 *How.* 188; Seaver *v.* Genner, 10 *Abb. Pr.* 256). The sheriff has no greater liability than that of bail (Gallarati *v.* Orser, 27 *N. Y.* 324).

III. It is obvious that the sheriff has not all the rights of bail, because the bail may surrender their principal, the defendant, immediately after they give their bond, if they so choose; but, the sheriff has no right of re-arrest in any event until ten days, and in cases of notice of non-acceptance, twenty days thereafter. The sheriff has no greater rights than the bail. Now, will it be pretended for an instant that if bail has been given in an action, and that action has gone on to trial and been tried, and the defendant has paid the judgment or has succeeded on the trial, that the bail have a right to re-arrest their principal, simply because they have not been notified of the status of the case? The fact of a right to an arrest must precede an arrest. Want of notice is no defense (Deyo *v.* Van Valkenburg, 5 *Hill*, 242).

IV. Bail are sureties, and are entitled to the benefit of the general principle relative to sureties, that dealings between their principal and the creditor, of which they have no notice, or to which they do not consent, discharges their liability (Rathbone *v.* Warren, 10 *Johns.* 586; Clark *v.* Niblo, 6 *Wend.* 237).

If, therefore, the bail are under no liability in law, they certainly have no right of arrest based only upon that liability, and the sheriff being liable as bail, is to be measured by the same rule. Any liability on the sheriff's part was to the plaintiff, and the plaintiff, having given the stipulations extending time for justification, could not have recovered from the sheriff, because she had, if any damage had ensued, contributed to it. It could not be possible for the plaintiff to recover in

any action against the sheriff (Dickson *v.* Frazer, 9 *Hun*, 191, and cases *supra*).

V. The sheriff, however, had notice of this stipulation. On November 20, 1876, he sent from his order of arrest department a letter claiming that the sureties had not justified, and requesting that they be approved of at once. The letter was signed by W. H. Quincy, who was his deputy sheriff in charge of the order of arrest department at that time. And the attorneys immediately responded thereto by sending over to his office a copy of the stipulation of July 26. This stipulation and an answering letter were delivered at the sheriff's office during office hours, at the order of arrest department, with the clerk behind the desk, known to be such by the person making the service. This was sufficient under 2 *R. S.* 285 (6 ed. vol. 3, p. 447, § 46).

VI. If, however, it be held that the sheriff had a right to arrest the plaintiff, in the absence of being notified of the status of the case, and that the foregoing was not notice, then we say that just as soon as the sheriff was notified of this stipulation that he was exonerated; he was bound to let the plaintiff go, and was liable to him in an action for false imprisonment, for every moment that he detained him thereafter.

Legal liabilities depend upon all provisions of law in existence at the time of the transactions. One of the provisions of law when this bail bond was given, was that the time for serving notice of non-acceptance of bail, or notice of justification, might be enlarged by an order of a judge (*Old Code*, § 405; Burns *v.* Robbins, 1 *Code*, 62; 1 *Chitty R.*, first 7 or 8 cases). Another provision was that such time might be enlarged by a stipulation in writing, duly signed (Rule 16). An action of false imprisonment will lie where the process is misused, even though the arrest be lawful (Holley *v.* Mix, 3 *Wend.* 350; Doyle *v.* Russell, 30 *Barb.* 300; *Espinasse Dig.* 332).

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VII. The arrest and imprisonment were false upon another ground. The onus of justifying an arrest lies upon him who makes it. The law favors the liberty of the subject to such an extent that a plaintiff in an action for false imprisonment need only show the fact of imprisonment (Holroyd *v.* Doncaster, 3 *Bing.* 492). What is the justification here? a fancied liability as bail, and power under section 189 given to Erb to arrest plaintiff, be it observed. But the sheriff did not pursue the statute. He must, if he is liable as bail, take the same steps as the bail. He must either arrest the defendant himself, or indorse a written authority on a certified copy of the bail bond, to any suitable person (*Code of Pro.* 189). He did not empower Erb by any indorsement on a certified copy of the undertaking, but writes on a separate piece of paper what he calls a remand, and annexes it to the original undertaking. So that, even if he had a legal right to make the arrest, having done it in an illegal manner, the action lies.

Vanderpoel, Green & Cuming, attorneys, and *Almon Goodwin*, of counsel, for respondent.

BY THE COURT.—SEDGWICK, J.—No authorities are cited that decide the question on this appeal, and it must be decided upon general principles. The plaintiff in this case, having, after his arrest in the action of Leitch against him, given bail, was entitled (*Code Pro.* § 187) to his discharge from custody, and the sheriff did discharge him. This discharge was a matter of right, which a prisoner is entitled to enjoy, at any time before execution. There seems to be no reason to think that it may not be exercised repeatedly in the same action, as often as he may, by surrender, or for other reason, be returned to custody.

Under the Revised Statutes, a defendant arrested had the same right (2 *R. S.* 348, § 11 *et seq.*), and upon his discharge, the sheriff incurred a direct responsi-

bility to the plaintiff, that the defendant should put in special bail. If the defendant did not put in special bail, the enforcement of the sheriff's responsibility was begun by entering a rule requiring the sheriff to put in special bail, within twenty days after service of notice of the rule. If the bail were not perfected within this twenty days, upon filing an affidavit of service of notice of such rule, another rule might be entered, that an attachment issue against the sheriff. In the proceedings upon such attachment the plaintiff's rights were to be enforced, and the sheriff's indemnity was the right to prosecute the bond given to him by the defendant, and recover all damages he might have sustained by the neglect of the defendant to put in special bail. A noticeable and primary part of this plan is that, so far as the immediate action was concerned, the discharge from custody was final between the sheriff and the defendant, and the plaintiff, thereafter, looked for his remedy in the premises, not to the defendant, but to the sheriff. The Code of Procedure did not disregard this notion of the sheriff's duty and right, but modified it. It did not change the *quantum* of responsibility to the plaintiff. It did not lessen the defendant's right to be discharged. It gave the sheriff a new power of protecting himself against defendant, by making him his bail, and therefore authorized him, under proper circumstances, to surrender or recapture the defendant. By section 186 of the Code of Procedure, the defendant, at any time before execution, shall be discharged from the arrest. By section 193 (*Ib.*) the sheriff or defendant may give to the plaintiff notice of justification of the bail. By section 196 (*Ib.*) if the judge find the bail sufficient, he shall indorse his allowance on the examination, "and the sheriff shall thereupon be exonerated from liability." By section 201 (*Ib.*) "if, after being arrested, the defendant escape, or be rescued, or bail be not given, or justified, or a deposit be

not made instead thereof, the sheriff shall himself be liable as bail." But he may discharge himself from such liability by the giving and justification of bail "at any time before process against the person of the defendant to enforce an order or judgment in the action." By section 203, the bail taken upon the arrest, unless they or other bail justify, shall be liable to the sheriff for damages which he may sustain by reason of such omission.

It is evident that the sheriff had two diverse obligations, one to the defendant arrested, and the other to the plaintiff. These are not altogether correlative, although at certain points they may be. The fact of giving sufficient bail by the law as it stood before the Revised Statutes; by the Revised Statutes, and by the Code of Procedure, entitled the defendant to be discharged, and the sheriff was indemnified by the sufficiency of the bail. This is an affirmative, positive right, and it should be guarded on grounds of public policy, as well as of private law. The statute should not be, if it can be avoided, construed so as to attenuate it to an insignificant or formal privilege. What is the substance of this right if, immediately after the discharge, the sheriff becomes bail for him in such a sense that he may forthwith, as other bail may, re-arrest the defendant? I say this only for the sake of construing the statute in other parts. The learned counsel for the respondent did not claim that the sheriff would have such a right. Such being the rights of a defendant arrested, a point must be found when that right is brought, by the law, to an end. Statutes of this kind are to be construed in favor of the defendant, when it is possible at the same time to give the statutes a complete interpretation. That point is indicated by the words of section 201, "if the bail be not given or justified the sheriff shall himself be liable as bail." These words are not full or explicit, and the implications

of the phrase "if the bail be not justified" must be considered. The right of the sheriff to re-capture, growing from his power as bail, must be shaped and conform to the other equally certain right of the defendant to remain at large, after he has given sufficient bail. The words refer to the proceeding toward justification prescribed in the previous sections, and mean, if the bail do not justify in it. In a literal sense, the bail do not justify at any time before they are required to justify; but the real sense is, when they do not justify, as required by the law and practice of the proceeding, and there must be some default or failure on their part in this regard. It is the common practice to have justification of sureties adjourned from time to time. Does the sheriff have the right to re-arrest, unless the allowance of the judge is given on the day first noticed for justification (See Overill *v.* Durkee, 2 *Abb. Pr.* 383). But it is argued that this right of adjournment should not be exercised indefinitely, to the injury of the sheriff or at his risk. It may be assumed that the sheriff should not be imperiled by an unreasonable delay, but the remedy is to have relief from the consequences and the character of the delay. Certainly, if the delay, although requested by defendant, is consented to by the plaintiff, there can be no inference that the sureties have failed to justify, or that they are not sufficient; and the result, at most, would be that it would be unreasonable and not within the meaning of the statute, for the sheriff to be held by the plaintiff as bail. This would relieve him as bail, and would not authorize an arrest by his power as bail.

The sheriff must show the sufficient cause of re-arrest; that is, he must show that he has become bail. He must therefore show that the sureties failed to justify, or that there was a default in this respect. The mere lapse of time will not show this. This obligation is grounded upon the meaning of section 201, but it

arises upon the general duty to show sufficient and legal cause for depriving a man of liberty. In this case, the only justification shown was a remand upon the original undertaking. This was not enough. It only showed that the plaintiff had once given bail and had been discharged. It was necessary to show, in addition, that the sureties had failed to justify. Suppose an undertaking, after the remand, had been offered with the same sureties, what could the sheriff have given as reason for not enlarging the prisoner? They were presumed to be sufficient, he having once passed upon that. He could not correctly say that they had failed to justify. The sheriff had, or might have done all that the statute required him to do, to relieve himself from responsibility to the plaintiff in the first instance. He would come under responsibility as bail for the first time upon the sureties showing their insufficiency, and not justifying. In this case, it is manifest that the plaintiff could never hold the sheriff as bail, so long as they voluntarily adjourned the justification. If this be so, is it possible that he should have no liability as bail to plaintiff, and yet have power as bail to arrest defendant, who is plaintiff here?

All this implies that the sheriff must take the trouble to keep himself informed of the condition of the proceeding for justification. This is necessarily his duty. If he voluntarily acts in the capacity of bail, for the purpose of arresting a man, necessarily, he must show that he is bail. It is his personal and direct interest to do so, and the law has given him specific power to become a party to the proceeding; for he may himself give notice of justification, and if the sureties do not appear and do not justify, he may at once arrest the defendant.

The answer in this case makes the issue, in one form at least, on which the rights of the parties turn. It alleges that the "said bail neglected to justify as by

law required." There was no such neglect. The facts speak to the contrary.

With these results, it must be held that the notice given by the sheriff's deputy to the defendant's, now plaintiff's attorneys, "that I shall expect the undertaking upon arrest, in the above entitled action, approved of at once, either by the judge on justification or by the plaintiff's attorney," had no effect upon the plaintiff's rights. It did not increase the sheriff's power and make him bail and authorized to surrender. A failure to answer it did not make it the more efficient. It is not necessary to decide that it could not be evidence for some purposes, in a supposable condition of affairs.

When it was admitted in testimony, the facts that appeared in evidence in regard to the reply made by this plaintiff's attorney, required a submission to the jury whether as matter of fact that reply reached the deputy who signed the notice. That reply would have informed the deputy that the plaintiff's attorneys, in Leitch against the present plaintiff, had made a stipulation adjourning indefinitely the notice of justification of the sureties, and therefore the sureties had not made default in justifying. The stipulation was in form a consent that the defendant have five days after the decision of the motion to vacate the order of arrest, within which time to serve notice of his justification of his bail herein.

This reply was not of the kind of notices prescribed by law which must be served either upon the sheriff personally or at the office designated by the sheriff, under the statute. It referred to the personal and private relation of the sheriff to the then defendant. Whatever benefit the sheriff might claim from the notice signed by his agent, the deputy, he must claim subject to the answer made to his agent. There were

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facts tending to show that the answer reached the agent, and, at least, that was for the jury to pass upon.

I therefore think that the jury should not have been directed to find for the defendant upon the trial in this action, and that, as the case stood, the damages of the plaintiff should have been assessed.

Judgment reversed and new trial ordered, with costs of the appeal to the appellant to abide event.

SPEIR and FREEDMAN, JJ., concurred.

JOHN WEINMAN, RESPONDENT, *v.* JOHN DILGER ET AL., APPELLANTS.

Appeal—how discontinued.

An appeal is not discontinued as to the respondent, by the service of a notice of withdrawal, accompanied by a tender of costs to date; the order of the court is necessary to accomplish this. The respondent in such case may obtain an order that the appeal be declared abandoned; or he may proceed under *General Rule* 41, and *Rule* 4 of this court, if no printed case has been served, and after the appeal has been placed on the calendar, move for a dismissal thereof.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided April 5, 1880.

Motion to dismiss appeal.

After the respondent had obtained judgment below, the appellant stayed proceedings upon it, by giving the usual undertaking with two sureties. On their justification, one was held sufficient, and the other insufficient. The appellant obtained further time, in

which to serve a new or further undertaking. On the last day of such time, appellant's attorney served a notice, that "the notice of appeal heretofore served in this action is hereby withdrawn." At this time, a proposed case had been served and amendments had been proposed, but nothing more was done, after the notice that appeal was withdrawn; $50, as costs on the appeal was tendered by the appellant. On notice and on affidavit of these facts, and also that no printed case had been served, an order was made at special term that this case be placed upon the general term calendar. The affidavit asked that it might be placed upon that calendar "in order to dismiss said appeal, in the regular way."

The respondent now moves, upon notice, that the appeal be dismissed.

Hawkins & Cothren, for motion.

Anderson & Howland, opposing, for surety.

BY THE COURT.—SEDGWICK, J.—The notice that the appeal was withdrawn did not discontinue the appeal. An order was necessary to accomplish that, and the appellant had such rights, that the court, if applied to for an order of discontinuance, might have absolutely denied it or granted it in a modified form. The ordinary practice would have been to obtain an order that the appeal be declared abandoned, for this motion is not strictly grounded on the non-service of printed papers (*Rule* 41, amending *Rule* 50 of the general rules, and *Rule* 4 of this court). This would have been a mere form, inasmuch as the notice of withdrawal of appeal was an abandonment of the appeal by the appellant, although not a discontinuance of it, as to the respondent. The motion should therefore be granted. Of course, this decision does not affect the rights of the

surety, if an action be brought against him on the undertaking, except so far as the *ipsum factum* affects it. Whether or not the dismissal of the appeal now made is within the meaning of the undertaking, will be determined in any action that may be brought upon it.

The motion to dismiss is granted, with $10 costs of the motion, and the costs of the appeal, to the time of the order directing that the case be put on this calendar.

SPEIR and FREEDMAN, JJ., concurred.

SAMUEL HATHAWAY, RESPONDENT, *v.* HENRY RUSSELL, IMPLEADED, &C., APPELLANT.

Accounting, reference in action for.—Interlocutory judgment, entry of, appeal from.—Practice.

This action was brought for an accounting by defendant as plaintiff's agent, and was by order sent to a referee to hear and determine all the issues. After the filing of the referee's report, which stated, as a conclusion of law, "*that the defendant should be ordered and adjudged to account*," &c., an *ex parte* motion for interlocutory judgment thereon was made by plaintiff at special term, and an order entered which "*adjudged and decreed that it be referred to the same referee to take and state an account*," &c., and proceeded to specify in detail the manner in which the accounting should be had.

Held, that the above conclusion of law is a sufficient order for judgment by the referee, as required by section 1022, *Code of Civil Procedure*.*

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* The several questions,—whether the referee might have proceeded to the accounting under the original order of reference, without a further order; and whether, under the course pursued, the order for interlocutory judgment should have been made *ex parte*; and if not, whether appellant, if aggrieved thereby, should not have moved

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Also *held*, that the court below did not exceed its powers by "ordering more than a simple judgment that defendant account," &c., the excess objected to being only a correct statement of the mode of procedure in an accounting, which was binding upon the referee.*

to set it aside before appealing, were not before the court. But see Hathaway *v.* Russell (45 *Super. Ct.* 538 ; S. T.), note.

* The interlocutory judgment was entered in form as follows :—

"On reading and filing the report of, &c., bearing date, &c., and filed herein, on, &c., to whom it was referred to hear and determine the issues in this action, and it appearing to the court that an accounting of the printing or the type-setting of *The Church Journal* newspaper mentioned in the complaint, from in or about, &c., to and until, &c., is necessary before final judgment can be entered in this action ; now on motion, &c., of the plaintiff, it is adjudged and decreed : That it be referred to the same referee, &c., as referee, to take and state an account of all dealings and transactions between said defendant Henry Russell and the said *The Church Journal* newspaper or the printers or proprietors thereof, with respect to the printing or type-setting of said newspaper, and with respect to any and all profits arising therefrom, from, &c., to and until, &c., and for the better taking and stating of such account, that the defendant Henry Russell produce and file with said referee within twenty days after service of this judgment on him, an account of all the said business transacted by him in and about *The Church Journal* newspaper, from, &c., to, &c., said account to be stated by them in the form of debtor and creditor columns ; and that plaintiff be at liberty to surcharge and falsify said account so to be exhibited by said defendant, and to that end may cross-examine said defendant as to said account or any item thereof, either orally before said referee or on written interrogatories to be filed with said referee and served on defendant's attorney within twenty days after said account is filed, and the sworn answers thereto to be filed with the referee within twenty days after the interrogatories are filed: And for the purpose of the oral examination hereinbefore provided for, the defendant Russell shall attend before said referee at such times and places as said referee shall from time to time appoint. And the said plaintiff and the said defendant Russell are to produce before the said referee, upon oath, all books, accounts, deeds, papers, contracts, vouchers and writings in their custody or under their control relating thereto ; and said referee in taking such account is to make all just allowances to the parties as between themselves ; and what on balance of the said account shall appear to be due from either party to the other, is to be paid as the said referee shall direct, and the said referee is at liberty to state and

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It seems, that so far as the rights of plaintiff are concerned, the above form of judgment is not an adjudication that the reference is to proceed because the defendant is liable to account.

Whether the said judgment might have been entered by the clerk, *quære*.

Further *held*, that exceptions contained in a case made and settled may be heard on appeal to general term from an interlocutory judgment.

Upon the facts, *held*, that the interlocutory judgment should be affirmed, and the reference directed by it should proceed.

Before SEDGWICK and SPEIR, JJ.

Decided April 5, 1880.

Appeal from interlocutory judgment.

The complaint charged that plaintiff, being the owner of the stock, business and good-will of a printing office, at No. 9 Spruce street, in the city of New York, the defendant became and remained his agent in said business, and had entire charge thereof, as foreman or superintendent; that it was agreed between them that "defendant was to devote his entire time and his best energies to plaintiff's business, and was to account faithfully to plaintiff for all profits realized in said business; that defendant had failed to devote, &c., and failed to account to plaintiff for the profits realized in the business, but had established on his own account, and without the knowledge or consent of the plaintiff, a printing office, in the same building, &c., in competition with the business of plaintiff; that defendant had used for his own benefit in the office established by him the types, stocks and materials of plaintiff; that defendant had, by means of the premises, made large

report any special circumstances as well as his reasons for allowing or disallowing any allowances which may be claimed. And it is further ordered that the question of costs as well as all other questions are reserved until the coming in of the report and hearing further directions."

gains and profits, which in equity belonged to plaintiff, and for which gains the complaint demanded that defendant account.

The answer put in issue the allegations of the complaint on which the demand for an accounting was based, and made certain admissions, which are referred to in the opinion.

By order, the action was referred to a referee to hear and determine all the issues.

The referee proceeded to the trial of the action, and reported that the plaintiff was entitled to an account from the defendant of gains and profits made by him, from the printing, &c., of a journal, called *The Church Journal*, carried on at No. 9 Spruce street. The plaintiff's attorney, on the filing of this report, moved at special term for interlocutory judgment.* So far as the record shows, this motion was *ex parte*.

Thereupon was entered an order reciting that on reading and filing the referee's report, and it appearing that an accounting of the printing, &c., of *The Church Journal* is necessary before final judgment can be entered in this action, on motion of plaintiff's attorneys, "Adjudged and decreed, that it be referred to the same referee, &c., to take and state an account, &c." The order proceeds to specify the manner in which the accounting should proceed before the referee.

After the entry of this order the defendant's attorney filed exceptions: 1st, to the "form of judgment entered in this action on the 27th day of October, 1879, because it is not in conformity to the referee's report herein, and is unauthorized as to all that part thereof beyond the directions in the conclusions of law found in said report; 2d, to the entry of any judgment upon said referee's report, inasmuch as the referee has failed

* See Empire Bldg., &c. Association *v.* Stevens, 8 *Hun*, 515.

to direct the proper judgment, as required by section 1,022 of the Code of Civil Procedure.

Afterwards, the defendant gave notice that he appealed to the general term from the judgment of the special term entered upon the referee's report herein.

Thereafter, a case, containing the evidence, exceptions and proceedings, was settled by the referee, and this case comes up, with the other papers, on this appeal.

Gilbert O. Hulse, for appellant.

Lindley & Lindley, attorneys, and *Sutherland Tenney* and *John Lindley*, of counsel, for respondent, among other things, urged:—The practice pursued respecting the entry of judgment, and the form of judgment herein, is correct. *Vide* section 994 of Code of Civil Procedure (by which it is implied that this practice should be followed). 1. As to the mode of taking judgment: it is to be entered as by the court at special term (Hancock *v.* Hancock, 22 *N. Y.* 568–570; Currie *v.* Coles, 7 *Robt.* 3). 2. As to form: See Wiggin *v.* Gans (4 *Sandf.* 646); Palmer *v.* Palmer (13 *How. Pr.* 363); Mendorff *v.* Mendorff (1 *Hun*, 41); Trufaut *v.* Merrill (37 *How.* 531); 1 *Barb. Ch. Pr.*, 327; 2 *Van Sant Eq. Pr.* 194; 3 *Wait's Pr.* 338; Breevort *v.* Warner (8 *How. Pr.* 321); Ketchum *v.* Clark (22 *Barb.* 319); Story *v.* Brown (4 *Pai.* 112).

BY THE COURT.—SEDGWICK, J.—The statement of the proceedings discloses that numerous and novel matters of practice are involved. The referee to hear and determine proceeded so far as to determine that the plaintiff was entitled to an accounting as to certain matters. Whether he might have proceeded to the accounting without a further order (Ludington *v.* Taft, 10 *Barb.* 447), or whether the referee should have re-

ported as he did, and then an interlocutory judgment have been moved upon notice (Bantes *v.* Brady, 8 *How. Pr.* 216), or whether the order entered should have been made *ex parte*, or whether the appellant, if he be aggrieved by that, should not have before appealing moved to set it aside, or whether, in fact, the so called interlocutory judgment is anything more than an order directing the referee to do what by the first order of reference he was ordered to do, are questions which have not been brought before the court on this appeal by counsel for either side,—for the reason, it must be supposed, that if they are not immaterial, the counsel do not wish that the decision of the appeal should turn upon them.

The only points that the appellant's counsel present on the argument, and that concern the former practice of the proceeding, are two. It is submitted, first, that the referee has failed to order any judgment in his report, as required by law and section 1,022 of the Code of Civil Procedure. I do not see that this is correct, in view of the report "that the defendant should be ordered and adjudged to account, &c." This certainly is a judgment directed, and if the objection be, that the referee should have proceeded to the accounting and determined if anything were due, the appellant is not harmed, because the order appealed from directs no more than that he shall do so. It is here to be noticed, that the order appealed from, as drafted by plaintiff's attorney, does not adjudge that the defendant is bound to account, or that the plaintiff is entitled to an account, but it is adjudged, &c., "that it be referred to the same referee to take account, &c." So far as an adjudication of the rights of the plaintiff is concerned, this is not a determination that the reference is to proceed because the defendant is liable to account. No objection is taken to the order on this ground. The second point is that the court below exceeded "its

powers in the judgment entered," in ordering or decreeing more than a simple judgment, that the defendant account for the profits, &c. The excess, thus objected to, is no more than a description in detail of the correct manner of proceeding in an account. If the order had directed an accounting or an accounting in the usual manner, the referee would have been bound to do as described by the order entered (Wiggins *v.* Gans, 4 *San.* 646).

The respondent's counsel does not claim that the order is not appealable, but that as this is an appeal from an interlocutory judgment, it, by section 1,353, Code of Civil Procedure, must be heard upon a certified copy of the notice of appeal and of the papers used before the court or the judge upon the hearing of the demurrer, application for judgment or motion as the case requires." In this case, I prefer not to pass upon this point, applied, as it is, to a court entering a form of judgment, which perhaps might have been entered by the clerk immediately upon the referee's report. An examination of the question involves the construction of several new sections of the Code, as to which the views of counsel were not presented. Both sides have treated the order as if it were an interlocutory judgment, and have joined in the settlement of a case containing the exceptions, and sections 1,349 and 1,350 clearly intend that such exceptions may be heard upon the appeal from the interlocutory judgment (§ 1,336). The merits will therefore be examined.

There were exceptions taken, particularly those that relate to the contents of letters not produced, which might call for decision, if it did not appear, that the facts, without resort to the matters admitted under these exceptions, sustained the conclusion of the referee.

The question was simply whether the defendant received from the *Church Journal* money which he

should, under his agreement with plaintiff, or by reason of his relation to plaintiff, have accounted for and paid over to him.

The answer admitted certain important facts. It admitted that the agreement was that the defendant should manage and superintend the plaintiff's business, and that defendant should be left in undisputed control of the business. It denied that he agreed to give all his time and talent, but the referee found, on sufficient evidence, that he did so agree. It alleged that the proprietor of the *Church Journal* applied to the defendant to print that journal, and that defendant immediately conveyed such proposal to the plaintiff, who declined it. The referee found that such was not the fact. The answer asserted that the plaintiff knew that the defendant was printing the *Church Journal*, The referee found that the plaintiff was ignorant of this.

The answer admitted that the defendant agreed to and did print, on his own account, the *Church Journal* in the same building where plaintiff's printing office was, and that he was in the habit of using plaintiff's type in printing the *Church Journal;* and stated in explanation of this, that he used the type of the *Church Journal* to a greater extent on work done by the plaintiff. The publisher of the *Church Journal* during the time the defendant printed it, testified that he did not know of any printing material belonging to the *Church Journal*, except the mail list and the heading of the paper; that it did not have any type or any materials used in printing, and never owned a stick of type. There was proof of the agreement that the defendant should do the type-setting for the *Church Journal*, and the bills paid to defendant for that averaged $100 a week. There were matters given in evidence which called for explanation from the defendant, but he gave none, and offered no testimony in his own behalf.

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On this testimony, I am of opinion that the referee was right in considering that the defendant was bound to do the business of the *Church Journal* for the plaintiff and not for himself. Indeed the only difference between that and the avowed business for plaintiff, was that he wrongfully did it in his own name. For aught that appears in the case, he might as well claim a right at his option to do for himself, and not for the plaintiff, any other piece of business that offered itself at the plaintiff's printing office.

The interlocutory judgment should be affirmed with costs, and the reference directed by it should proceed.

SPEIR, J., concurred.

THOMAS DONOVAN, APPELLANT, *v.* WILLIAM H. McALPIN ET AL., RESPONDENTS.

School trustees of New York city—nature of the several boards, as official bodies—personal liability of members.—Quasi corporations.

The several boards of trustees of the common schools of the city of New York, for the respective wards thereof, are, under the statute (*Laws* 1873, c. 112, § 6), official bodies in the nature of corporations.

The trustees cannot be held liable in an action against them personally, for the negligence of workmen employed by the board, upon the theory that the relation of master and servant exists between the trustees personally, and the said workmen; the board of trustees, as a corporate body, is, in such case, the master.

The liabilities and duties of members of *quasi* corporations, and the authorities relating thereto, discussed by the court.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

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Motion for new trial on exceptions ordered to be heard in first instance at general term.

The complaint alleged that the plaintiff was on, &c., a scholar, attending a public school of the city, in the 4th ward; that five of the defendants were then, &c., "holding the office known as ward trustees or school trustees of said ward, and were charged with the care, custody and safe keeping of said school building and premises, and with the duty of keeping the same at all times repaired, and in a secure, safe and proper condition at all times, for the use of this plaintiff and such other scholars as were lawfully in attendance;" that the other defendant then, &c., held the office of superintendent of school buildings, and as such was charged, as well as said trustees, with the duty of inspecting said school building and premises at all times, with reference to their condition as to safety, security, or need of repair, and whenever necessary repairs thereon should be made, to join the aforesaid trustees in superintending the same, and seeing that they were properly managed and conducted, with reference to the security of said building and premises, and of the scholars there in attendance; that on, &c., certain repairs were being made upon the said school building, "under the orders and directions of the aforesaid trustees, and under the supervision and direction of said trustees and said superintendent, while this plaintiff was lawfully in attendance," &c. "That the defendants so negligently, by themselves or their servants and employees engaged in said repairs, conducted and managed or superintended the same, and so negligently kept said premises, that a certain iron grating located in the yard of said building, and on said premises, and covering there a certain hole or pit of many feet in depth, was wrongfully and carelessly lifted or drawn aside from said hole, which was thereby, for the greater convenience of said workmen

engaged in said repairs, left open, and suffered to remain exposed and without proper protection, &c.; that the plaintiff, being entirely free from negligence on his part, fell into said hole or pit, and in consequence was injured, to his damage, &c."

The answer was in substance the general issue.

The counsel for plaintiff, in opening the case to the jury, stated that he should prove that a grating over an opening leading to the cellar of the school building, in charge of the defendants, had negligently been left open by the workmen employed in making the repairs stated in the complaint. The counsel did not offer to prove any personal act of negligence on the part of any of the defendants, or any personal knowledge of this fact that the workmen who were engaged in repairing the school-house had opened the trap-door.

The counsel for defendants then moved to dismiss the complaint, and the court granted the motion.

W. C. Whitney and *Hugh L. Cole*, for respondent.

Thomas & Wilder, attorneys, and *Edward P. Wilder*, of counsel, for appellants.

BY THE COURT.—SEDGWICK, J.—The learned counsel did not, on this appeal, discuss the legal character of the office of trustees of common schools of the city of New York, for the respective wards (*L.* 1873, c. 112, § 6). The counsel for appellant claimed that if the official body named by the statute were responsible for damage caused by the negligence of the workmen employed by it to repair the school-house, the law made the different individuals who composed the body personally liable. Nor did the counsel for respondent state his views of the legal character of these officers. The argument was, that if the trustees were not a corporation, but merely a board of citizens appointed to

a public duty, who serve the public without pay, and who have no funds, out of which it was their duty to see that the repairs on the premises should be safely made, the courts have always placed them under the protection of the rule, that public officers are not held personally liable for the malfeasance or misfeasance of their employees or agents. It is not necessary, as I think, to maintain or deny this proposition in this case; but the opinion in Bartlett *v.* Crozier (17 *Johns.* 439), cannot be used to support it. That case did not involve liability for the negligence of an employee, and it was disapproved in Hover *v.* Barkhoof (44 *N. Y.* 113). In the present case, a defense could not be maintained on the ground that the trustees had no funds out of which it was their duty to see that the repairs on the premises should be safely made. They had procured the means, and the work was going on. I think, however, that it is quite clear that the statute makes the trustees either a corporation or a *quasi* corporation. In this action, they are not sued as the one or the other, and a question is not before us as to the form in which they should be sued, if deemed to be a *quasi* corporation (Gardner *v.* Board of Health of the City of New York, 10 *N. Y.* 409).

It must be admitted, that if they formed a corporation, the individual trustee would not be personally liable for the tort of the corporation. A corporate duty, is not, *ipso facto*, a duty of a person who is a member of the corporation. There seems to be no reason for enlarging the responsibility of a member of a *quasi* corporation, as to those matters in respect to which the law has given it corporate powers and duties. As to these matters the law has neither given the individual faculty to exercise the power nor made it his duty to exercise them. There cannot be negligence where there is no power and no duty.

The statute in question, imposes the duty of caring

for the school-houses and of repairing them, not upon the individual trustees, severally and jointly, but upon them as an aggregate body. The statute, in places, refers to them as a board and to exercising the statutory power by a majority of their number. It is consistent with this, that each has also an individual official power and duty, and therefore responsibility. A default in respect to this would be personal or individual. Upon the trial it was admitted that there was no individual negligence.

I do not ignore considerations that would be pertinent to a case that presented the question, if a *quasi* corporation were liable for its corporate tort, against whom or what an execution might issue. That question has not been argued at all, and it could not be properly argued in this action, that does not purport to be against the corporate body, but only against its members individually.

I do not see that the opinion in Bassett *v.* Fish (75 *N. Y.* 303) intimates that in an action against those called in that opinion "trustees of an ordinary school district," an individual trustee could be liable for what was the sole default of the trustees as a body or *quasi* corporation. The language makes a discrimination against such a rule. The opinion says, if the defendants were in the position of the trustees of an ordinary school district, "we would think that there was enough in the testimony to warrant the jury in charging them all with negligence in the performance of their duty." It states that the testimony showed that some of the trustees had personal actual knowledge of the unsafe state of the floor of the school-house; that all knew of the decay of the building, of the need of repair, and had repeatedly talked of it among themselves; and thus the condition of the building was known to them all. It further states that if the trustees inspected the building, they would have

been careless and in fault, if they had overlooked the hole in the floor; and if they did not go to inspect the building, then they would egregiously fail in doing their duty. Plainly, all the defaults and omissions of duty are considered to be personal and individual negligence. And the reason of the argument is that, if any of them were not guilty at negligence personally, such would not be liable.

Whatever, in such an officer, who is also a member of the aggregate body, may be assumed to be personal negligence—for instance, the violation of a duty of individual vigilance, that the body may be informed of the fact that calls for its action, or of an individual duty of calling the body together on an occasion that requires it, or of moving that joint action be taken, or of beginning a proposed joint action, and then demanding the co-operation of the other members of the body individually, or of using any individual official power —cannot be made the ground of the liability of the defendants here, for it is here admitted that there was no personal negligence on the part of any of the individuals sued.

Nor did the case of Hover *v.* Barkhoof (44 *N. Y.* 113) take a different view. In that case, the opinions refer, as the basis of liability, to acts and omissions, in which each of the defendants, individually or personally, shared. It was remarked that they refused to exercise their power, and resolved to postpone the performance of their official duty till the following spring; that there was evidence to show that the bridge was out of repair and unsafe, and that all of the defendants had notice of it, and that the burden imposed upon these officers was not too great. "All it requires of them is that they shall, with reasonable care and fidelity, discharge the duties which they have solemnly sworn to perform." This indicates explicitly that the

performance of personal duty is all that the law demands.

On the trial, the form of the claim was that the defendants were liable as masters or superiors of the workmen, who opened and left open the trap-door. Following out the view that has been taken, it must be held that the individuals were not the masters of the workmen. The trustees, as a corporate body, was the superior. The individuals could not employ and could not annul the employment. If an individual, as matter of fact, did competently do either, he would do it as representing the board. The relation of one member to the body is not like that of one partner to a partnership. In such instance each act, by the single partner or by the partnership, is not only for the firm, but for the individual members of the firm.

If the form of the claim be varied, and the liability be placed upon the duty of seeing that the trap-door was not negligently opened, the legal result is the same. By the concession of the case, each member of the board performed his duty in that regard, kept proper watch, made due observation, and did all that he was called upon to do. This inference is not less sound, because perhaps it should also be inferred from these facts, that in such case the corporate body could not have been guilty of negligence. Of course, it is not so decided.

As to the defendant, who was the superintendent of the school building, I do not see how any case can be stated against him, if he is admitted to have been free from any act of personal negligence.

Exceptions overruled, and judgment directed for defendant, with costs.

FREEDMAN, J., concurred.

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SCHUYLER G. CHADSEY, RESPONDENT, *v.* WILLIAM H. GUION, APPELLANT.

Marine insurance—policy "free from particular average"—what necessary to recover under—constructive loss.

Where the cargo of a vessel is insured, "free from particular average," it is not necessary that there shall be an actual, total, physical loss of the thing insured; it is enough if there be a constructive total loss, *i. e.*, such a destruction of all value as amounts, in consideration of law, to a total loss to the owner. But in such case there must be an abandonment of the goods by the insured, to enable him to recover as for a total loss; and notice of such abandonment must be given, while the whole is in peril, and in a reasonable time; and if the insurers do not accept the abandonment, the owners must hold the property in behalf and for the interest of the insurer. If they hold and use or treat the property as their own, it will amount to a waiver of the abandonment.

The law and authorities in relation to marine policies, discussed by the court.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal by defendant from judgment and from order denying motion for new trial.

This was an action upon a policy of marine insurance. A cargo of potatoes had been insured "free from particular average." While the canal boat that contained the cargo was moored to the dock, after her arrival at Yonkers, to which the insurance was made, she was sunk by a storm. The cargo was submerged, with the exception, as the testimony left doubtful, of a small part of the cargo. This happened on January 1, and notice of abandonment was given on January 4. On the trial the plaintiff claimed that the abandonment

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and the preceding circumstances, made a total loss, and also that there was an actual total loss, because the disaster had destroyed totally the value of the potatoes. The jury found for the plaintiff, for the full value of the potatoes.

On the trial the defendant's counsel claimed that the facts made no cause of action, and made certain exceptions on points which are passed upon in the opinion.

Treadwell Cleveland, for appellant, among other things, urged:—I. There is a conflict between the printed words and the written words; the latter then govern (*Phillips on Ins.* § 125, and authorities cited; 1 *Parsons on M. Ins.* 65; Burt *v.* Brewers' Ins. Co., 9 *Hun*, 383; Harper *v.* New York Ins. Co., 22 *N. Y.* 444).

II. It is the established law in this State that under such a form of policy as in the case at bar the insured cannot recover for a total loss of a part, if any part of the subject reaches the port of destination in specie and of value (Wallerstein *v.* Columbian Ins. Co., 44 *N. Y.* 204; De Peyster *v.* Sun Mutual Ins. Co, 19 *N. Y.* 277; Ralli *v.* Janson, 6 *Ellis & B.* 422; Leroy *v.* Gouverneur, 1 *Johns. Cas.* 226; Magrath *v.* Church, 1 *Cai.* 196; Nelson *v.* Columbian Ins. Co., 3 *Cai.* 108; Salters *v.* Ocean Ins. Co., 14 *Johns.* 138; Moreau *v.* United States Ins. Co., 1 *Wheat.* 219; Poole *v.* Protection Ins. Co., 14 *Conn.* 46; Biays *v.* Chesapeake Ins. Co., 7 *Cranch*, 415; Humphreys *v.* Union Ins. Co., 3 *Mason*, 429; Buchanan *v.* Ocean Ins. Co., 6 *Cow.* 330; Bryan *v.* New York Ins. Co., 25 *Wend.* 617; Moreau *v.* United States Ins. Co., 3 *Wash. C. Ct.* 256; Burt *v.* Brewers' Ins. Co., 9 *Hun*, 383; Young *v.* Pacific Ins. Co., 2 *J. & S.* 321; *Arnold on Ins.* [*Maclachan*], 905; 2 *Parsons on Ins.* 292).

McDaniel & Souther, attorneys, and *Everitt P. Wheeler*, of counsel, for respondent, as to the construction of the policy, cited :—2 *Parsons Marit. Law*, 329 ; Osacar *v.* Louisiana State Ins. Co., 17 *Martin La. R.* (5 *Ib. N. S.*) 3,867 ; Harrison *v.* Ellis, 7 *Ellis & Black.* 465.

BY THE COURT.—SEDGWICK, J.—As to cases like the present, of goods insured free from particular average, Wallerstein *v.* Columbian Insurance Co. (44 *N. Y.* 222) did not hold that when part only of the goods have been landed after a disaster, the insurer will remain liable, if the part is so damaged as to be without value. It decided that when the ship sank with the coffee on board, there was a total loss of the coffee. The opinion should be referred to, to ascertain whether this was determined on rules applicable to actual or to constructive loss. It was on the latter, probably. The opinion says : " While thus exposed to the peril of a total loss, the master abandons the vessel, and notice is given to the underwriter ;" and then proceeds to state that " the loss of the coffee was total, and the right to recover became fixed, when the abandonment was made. The rescue of a portion of the contents of the vessel, with whatever motive it was done, did not undo what was already done. It could not convert into a partial loss that which, under the circumstances detailed, the law adjudged to be total." The decision would have been the same if the insurer, by some accident, had been able to land a part of the coffee in a sound state, provided, it may perhaps be reserved, the value of that part was not great enough to show that there was no constructive total loss.

The court did not declare the law to be, that a destruction of all value to the owner was in itself a total actual loss. It said that in cases like the present, the chief question has been, whether there must be an

actual, total, physical loss of the thing insured, or whether there may be a constructive total loss; whether there must be demolition or annihilation, or whether a destruction of all value to the owner, and hence a total loss to him, is sufficient. The current of authorities, both in this country and in England, as well as the conclusion of elementary writers, is in favor of the doctrine of constructive loss. This reasoning, of course, involved the necessity of the insured abandoning the goods, to enable him to recover as for a total loss; and it was said "the notice of abandonment must be given while the whole is in peril, and in a reasonable time."

In this case, the burden of proof was upon the plaintiff to show sufficient facts to make the total loss claimed, and among these, that the abandonment was made at such time that the partial loss was to be deemed total by law. There was no proof to show, satisfactorily, that the notice of abandonment was sent before there had been any goods landed, after the disaster. The testimony seems to show that eighty barrels of potatoes had been landed before the witness Pilleori went to the boat, and before January 4, when the notice was sent.

If the proposition were valid that these eighty barrels must be disregarded, because they had no value after the expenses in regard to them were deducted from their damaged value, the facts would not sustain it. These potatoes were damaged to the extent of one-half of their sound value. The evidence does not show what were the expenses of getting them out of the sunken boat, and which were to be charged to them. Of course, to reduce the value of these eighty barrels, charges cannot be made, which would have to be borne if they were delivered to the owner in a sound state, nor should the whole of the pumping out the boat be borne by this particular lot. This last was to

be borne by the whole cargo, if not also by the boat. If the improper charges were not made, as the proof stands, the eighty barrels, when landed, were nearly, if not quite, worth fifty per cent. of the sound value, and the evidence does not show any deduction that should be made.

Moreover, to prove an abandonment, it is not sufficient to prove only a notice of abandonment. In addition, there should be proof of an acceptance of the abandonment, or, in case the insurers do not accept, the owners must hold the property in behalf and for the interest of the insurers. If they hold and use or treat the property as their own, it will amount to a waiver of the abandonment (2 *Par. Mar. Ins.* 190; Waldens *v.* Phœnix Ins. Co., 5 *Johns.* 325). There is no doubt, that very slight facts will show that after a notice the insured held the property as agent or trustee of the insurer, or that, all other things being regular, the holding and the dealing will be presumed to be for the insurers. In the present case, however, the way in which the owners dealt with the property shows that they exercised the dominion of owners in their own right. The careless manner of selling the potatoes, the nature of the contracts they made, and the entire omission to consult the insurers, who were at hand, show this. For this reason, either the abandonment was never consummated, or, if it is assumed to have been, there was a waiver of it by the owners.

As there was no abandonment, there could be no recovery, unless the plaintiff, proved that there had been an actual total loss. On this point, the position most favorable to the plaintiff is, that there was a total destruction of value, by reason of the disaster, taking into account the expenses necessarily incurred that were caused by the disaster. The burden of proof is on the plaintiff, and no such destruction of value was shown. There was no testimony as to what expenses the disas-

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ter had caused. There were some vague statements, as to the result of sales, but in these statements it was possible to find the amount of the expenses. The general description of the amount of damage was vague and insufficient. At least, there were one thousand barrels of potatoes taken from Yonkers to New York, and sold in the latter place, at private sale, and the most satisfactory thing said by the person who removed them and sold them, is that he got enough to pay him for his expenses and his time.

It is not necessary to decide that the defendant would or would not have been liable, if there had been an abandonment. The plaintiff could not recover without an abandonment.

The exceptions taken by the defendant's counsel, at the trial, raised the points that have been examined. It is not necessary to state them in detail.

Judgment and order denying motion for new trial reversed and new trial ordered, with costs of the appeal to appellant to abide the event.

FREEDMAN, J., concurred.

ANGUS P. McINTYRE, RESPONDENT, *v.* FREDERICK RADUNS, APPELLANT.

Disorderly conduct—breach of peace—right of police officer to arrest.

A police officer, or other known conservator of the peace, may lawfully interpose to prevent a breach of the peace, and so long as there remains any danger of it the duty of interference continues.

He has the right to remonstrate against noise and disturbance in the street, and if an assault upon him be attempted for so doing, he may arrest the offender.

What constitutes a breach of the peace, also the general rights and duties of police officers in making arrests,—considered by the court.

Opinion of the Court, by SEDGWICK, J.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal from judgment and from order denying motion for a new trial.

The action was for false imprisonment. The complaint charged that the defendant, being a member of the police force of the city, maliciously and illegally compelled the plaintiff, against his will, to go with him to a police station-house, &c. The answer alleged that at the time, &c., the plaintiff was acting in a loud, disorderly manner at night, in the public street, and was guilty of conduct tending to a breach of the public peace and quiet; and upon the defendant's requesting the plaintiff to cease therefrom, the plaintiff then and there assaulted the defendant, whereupon the defendant caused the plaintiff to accompany him to the station-house.

The jury found for the plaintiff.

Hugh L. Cole, for appellant.

Richard Busteed, for respondent.

BY THE COURT.—SEDGWICK, J.—The defendant's counsel, upon the trial, requested the judge to charge the jury that the arrest was legal, under the facts and circumstances as stated by the defendant. The learned judge was not of this opinion, and refused so to charge.

The defendant had testified that near the corner of Mulberry and Mott streets, after midnight, he saw the plaintiff in company with a lady, coming up the street very loud and noisy, dragging her by the arm along the street; that he went to plaintiff, tapped him on the shoulder, ordered him to be quiet, telling him that it was not a proper way, on the public street, to be

making such a noise at that hour of the night; that the plaintiff did not stop; that he again told them to stop, that it was a bad neighborhood around there; that the plaintiff then left the lady, turned back, was very excited, and made a blow for the defendant with his fist, stopped, turned again, and made a second blow for the defendant; that he asked the plaintiff twice to keep quiet, and before the plaintiff was arrested he had struck twice at him. The plaintiff and his witnesses had testified to a state of facts that contradicted the defendant's evidence, and if their verdict was only that the plaintiff's testimony was true, the defendant was clearly liable; but under the charge the jury may have found for the plaintiff, although the facts were as stated by the defendant.

Under the circumstances sworn to by defendant, the plaintiff would not have been justified in assaulting the officer. The blows would not have been offered in self-defense. The officer, if he were believed, had not arrested or attempted to arrest the plaintiff. He had only mildly and properly cautioned them against noise or disturbing conduct. An assault upon a police officer, when in the discharge of his duty, has been declared to be a misdemeanor by section 22, chapter 569, *Laws of* 1857. This recognizes the rule of the common law on this subject. "If a man makes assault upon the constable, he may justify to arrest him who made the assault, and to carry him to jail, for breaking the peace, though he himself be party" (*Viners' Ab.* "Constable," [E.] 7).

If the arrest had been made upon the other facts stated by the officer, there having been no assault, there would have been a question for the jury. The peace officer has a right, and it is his duty to arrest, persons who commit a breach of the peace in his presence. The duty is described by PARKE, B., in Howell *v.* Jackson (6 *C. & P.* 723): "For if the plaintiff made

such a noise and disturbance as would create alarm, and would disquiet the neighborhood, and the persons passing along the adjacent street, that would be such a breach of the peace as would not only authorize the landlord to turn the plaintiff out of the house, but it would also give the landlord a right to have the plaintiff taken into custody if this occurred in the view of the watchman." In the case cited, the breach of the peace happened in a public house. The rule stated has greater force when it is applied to an occurrence in a public street. The officer must take the risk of the facts justifying him, and in a case like the present it should be left to the jury to determine whether the conduct of the arrested party was calculated to disturb and alarm the neighborhood, to attract a crowd, to lead to disorder or riot. The character of the neighborhood may be considered. It should be proved by competent testimony. A statement of the officer to the arrested party, while he was cautioning him that it was a bad neighborhood, is not proof of the fact. The officer, before resorting to the extreme remedy of arrest, should request the party to cease from noise or misconduct, and should not arrest if the request is complied with. This observation is to be confined to cases like the one here, for there may be breaches of the peace which demand immediate arrest.

A constable or other known conservator of the peace may lawfully interpose upon his own view to prevent a breach of the peace or to quiet an affray (1 *East P. C.* 303). One great use of police officers is to nip mischief in the bud (1 *Bennet & H. L. C. C.* 201, citing Rex *v.* Hems, 7 *C. & P.* 312). This duty of interference continues while there remains any danger of a breach of the peace, and if remonstrance or mere interference are not sufficient to avert the danger, the officer is justified in arresting the guilty party.

I therefore think there should be a new trial.

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Judgment and order denying motion for new trial reversed, new trial ordered, with costs of appeal to appellant to abide event.

FREEDMAN, J., concurred.

AMALIA MEYER, RESPONDENT, *v.* THE PRESS PUBLISHING COMPANY, APPELLANT.

Verdict—presumption that jurors have compromised opinions as to amount—Libel—rule as to damages.

There is no presumption that individual jurors have compromised their opinions in arriving at the amount of a verdict in an action for libel where there is no evidence as to damages, from the mere fact that the verdict is for a certain number of dollars and *three cents*.

The rule as to damages in actions for libel stated by the court, and a verdict of $1,375.03, held not excessive, as actual damages to plaintiff in her business as midwife, from a libelous writing in regard to her said business, printed and published in a newspaper in New York city, where a retraction of the charge made was published in the same newspaper two days thereafter, no evidence of damage being before the jury. In such case, the question of malice, in its bearing upon the right to exemplary damages, should not be taken from the jury.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal by defendant from judgment and from order denying motion for new trial.

The complaint showed that the plaintiff was a midwife, and that the defendant was the publisher of the *World*, a newspaper published in the city of New York.

That defendant maliciously published a false and scandalous article in its paper, and that thereby the

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plaintiff has been injured in her trade and business as a midwife.

The gist of the article complained of was that Mrs. Meyer was well known in the profession as an abortionist. The damages were based on loss of business as a teacher of midwifery and as a midwife.

The answer admitted the publication, &c., and denied each and every other allegation of the complaint. The second defense, by way of mitigating circumstances, stated that the publications were inserted in its newspaper by its employees as items of public news, believing the same to be true, after due inquiry.

The third defense was that the publication occurred on September 11, and on September 13 a full retraction of said publication was made in the said newspaper, stating that the plaintiff was not intended, but another person of the same name.

The fourth defense was that the facts and circumstances under which the facts stated in such articles were gathered were such as to reasonably induce in the mind of a person possessed of ordinary intelligence and knowledge a belief in the truth of said publications; that the persons engaged in the publication of said paper before and at the time of said publications knew such facts and circumstances, and that they were by reason thereof led to believe in the truth of the charge, said facts being that the person really alluded to in said articles was not the plaintiff, but a Mrs. Dr. Meyer, a person generally called by the same name as plaintiff, and that statements were made by several persons to them that she was the same person as the one intended to be described, and that the persons who were engaged in said publications really believed that there was but one Mrs. Dr. Meyer in the city of New York.

Evidence was given upon the trial tending to establish the facts alleged in the answer, and a copy of the

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paper containing the retraction above referred to was in evidence.

No evidence of actual damage to plaintiff was given.

Alexander & Green, attorneys, and *C. B. Alexander*, of counsel, for appellant, among other things, urged: —I. In an action of tort the jury could not estimate the damage, in the absence of evidence, so as to honestly find a verdict of $1,375.03 (Kelly *v.* Sherlock, *L. R.*, 1 *Q. B.* 697; Falvey *v.* Stamford, *L. R.*, 10 *Q. B.*, 54).

II. The verdict is contrary to the weight of evidence because the defense showed due diligence and care (Dunn *v.* Hall, 1 *Ind.* 344); also grounds constituting reasonable cause (Shilling *v.* Carson, 27 *Md.* 186; Purple *v.* Horton, 13 *Wend.* 9; Skinner *v.* Powers, 1 *Id.* 451; Howard *v.* Thompson, 21 *Id.* 319; Donelly *v.* Swain, 2 *Phil. Rep.* 93; Snyder *v.* Andrews, 6 *Barb* 43; Potter *v.* Thompson, 22 *Id.* 87).

Davenport & Leeds, attorneys, and *J. S. Davenport*, of counsel, for respondent.

BY THE COURT.—SEDGWICK, J.—There was no error in any of the rulings of the learned judge upon the trial. The defendant's rights were protected, in every direction. The only point for particular consideration relates to the damages. The appellant's counsel claims that they were excessive and that the court should have granted the motion for a new trial on that ground. It is not denied that the libel was untrue, or that the plaintiff was entitled to an amount that would have compensated for the actual damage. But it is claimed that the preponderance of testimony was that there had been no actual malice; that the article complained of had been written after great care and attention, to find the truth of its statements; that a full retraction was

made on the day but one after the libel had been published, and that it was not a case, therefore, in which the plaintiff was entitled to exemplary or punitive damages. It is further claimed that on the evidence it is clear that the amount of the verdict, $1,375.03 was greatly in excess of the amount that would compensate the plaintiff for actual damages.

I am of opinion that the court was right in not taking from the jury the question of malice in its bearing upon the right to exemplary damages. The remarks of the judge on this point called the attention of the jury to all the particulars which were favorable to the defendant. On the other hand, it does not appear that the amount was in excess of actual compensation. It is to be presumed that the jury exercised a sober judgment in their assessment, and great weight is to be given to their action, in a matter which they are so much better fitted than a court to decide. Fry *v.* Bennett (3 *Bosw.* 246) gives the rule that must be applied to this case: "The true rule is, that if the defendant fails to justify, the plaintiff is entitled to recover, at all events, his actual damages. He has a right to these, although the defendant, at the time of publishing the libel, believed the facts alleged to be true. The actual damages are to be determined by the jury, in a sound discretion, upon a careful consideration of the offense or misconduct imputed to the plaintiff, the circumstances of the publication, the extent of its circulation, and the natural and necessary consequences of such a publication, according to the results of human observation and experience." That the libel charged a very gross violation of morality and law, in respects that it was natural and probable would seriously injure her personally and her business, cannot be denied, and the jury would have a right to consider whether there would not be damaging consequences from the

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charge, even after there had ceased to be any doubt that she was innocent.

A suggestion was made that the individual jurors must have compromised their opinions as to the proper amount of damages, for the reason that there is no other way of accounting for the three cents that was a part of the verdict. This is not convincing. It is more likely that twelve minds agreed upon a very exact estimate of damages, than that several were of such opinions as to the amount of damage that an average of them would result in the fraction of three cents, which it be thought important to retain.

I am of opinion that the judgment and order appealed from should be affirmed, with costs.

FREEDMAN, J., concurred.

ROSA DE JONGE, APPELLANT, *v.* PAULINE GOLDSMITH, RESPONDENT.

Life insurance—endowment policy payable to wife not assignable—Evidence.

A policy of insurance payable to the wife upon the death of her husband, or upon a certain date, should he then be living, is not assignable by the wife. A guaranty by the wife of the "sufficiency and validity of the assignment" does not give validity thereto; nor does the assignee acquire any interest in the policy by subsequent payment of premiums in good faith. His rights are limited to the recovery of the amount so paid by him.

The presumption that such a policy was issued for the purposes declared in the act of 1840, is not destroyed by proof of a former assignment by the wife for the husband's benefit. Whether such evidence is admissible for that purpose, *quære.*

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

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Appeal by plaintiff from judgment.

The action was begun by the plaintiff against The Mutual Life Insurance Company, to recover the amount of a policy of insurance upon the life of Henry Goldsmith, for the benefit of his wife, Pauline Goldsmith, the present defendant, and assigned by her to the plaintiff. The insurance company was allowed by order to substitute the present defendant in its place, having deposited in court the amount due upon the policy.

The policy was payable to the wife, on the death of her husband, or if he should be living on November 1, 1880, then, on that day. The husband died in 1877. Before his death, his wife assigned the policy to the plaintiff, by an instrument in writing which guaranteed "the validity and sufficiency of the foregoing assignment to the above named assignee." The assignee paid four quarterly premiums, before the death of Mr. Goldsmith.

The court held that the assignment was void, for want of power of the wife to assign, and adjudged that the defendant was entitled to the fund in court, excepting an amount equal to the premiums paid by the plaintiff, which amount was adjudged to be paid to the plaintiff.

James K. Hill, attorney, and *J. A. Shoudy*, of counsel, for appellant.

Eli M. Cohen, attorney, and *Otto Horwitz*, of counsel, for respondent.

BY THE COURT.—SEDGWICK, J.—Brummer *v.* Cohen, decided by the general term of the New York common pleas (58 *How. Pr.* 239), the discussion in the opinion of Judge LARREMORE in that case at general term, and of Judge J. F. DALY at special term, and the cases cited

by those judges, require that there should be an affirmance of the position taken below, that the assignment of the defendant to plaintiff was void. The interest of the wife is non-assignable, on the ground that the intent of the statute would be defeated, if such a policy were held to be assignable (Eadie *v.* Slimmon, 26 *N. Y.* 15).

It is then further to be observed that the guaranty by a wife, of the validity of such an assignment, must partake of the fundamental objection to the assignment itself. If the guaranty be valid, the law would not declare the assignment invalid. A promise to make the assignment valid and sufficient has not as much strength as actually assigning.

The learned counsel for appellant argues that, the payment of premiums by plaintiff in her own right, and while claiming to be the owner of the policy, cannot inure to the benefit of the defendant. "Whether or not the policy that is attempted to be assigned is or shall be kept alive, so far as the payment of premiums affects this question, depends upon the position that the company may take. The assignee pays the premium from time to time. If it be assumed that the assignee does not, by legal construction, act for the real owner of the policy, if the company receives the premium, knowingly or unknowingly, from the assignee, the sole effect is, that the policy has been, as matter of fact, kept in being, to be enforced according to its terms. It concerns the company only to raise the question that the party interested in the policy did not tender the premium, and that it was not obliged to receive a premium from a stranger, if an assignee of this kind be a stranger. The assignee voluntarily keeps the policy alive to be enforced according to its terms, and his sole right is confined to a claim he may make to the amount of the premiums paid by him.

I am of opinion (Brummer *v.* Cohen, *supra*) that it is

presumed from the form of a policy of this kind that it was issued for the purposes declared to be lawful by the act of 1840, and that the force of this presumption would not be destroyed, by proving that the wife had once before assigned the policy for the husband's benefit, regaining it by reassignment. Perhaps, though it is not necessary to decide this, no amount of acts or words on the part of the wife, after the policy is issued, could be given in evidence to show that the policy was not protected by the statute, for she might in that way succeed in violating the intent of the statute which is a prohibition upon her.

We think the learned judge was right, in the exercise of his discretion, in adjudging costs against the plaintiff. There might be a doubt, if only personal rights were concerned, that depended upon the agreement of parties. But there is a matter of public policy involved. The statute is well known. Its construction has been settled for many years, and any party that bases a claim that is forbidden by it, should do so with the risk of paying the costs of the action in which the claim is made.

Judgment affirmed, with costs.

FREEDMAN, J., concurred.

HARVEY M. MUNSELL, RESPONDENT, *v.* EDWARD FLOOD, APPELLANT.

Action to recover personal property--form of judgment in.

The clerk has no authority to enter an absolute judgment for interest in an action for the recovery of personal property, where the plaintiff is entitled to a judgment in the alternative for the recovery of the possession of the property, or in default of delivery for the

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value thereof, the jury having awarded no damages for detention of the property. The interest allowed by section 1,235, Code Civil Procedure, must be added to the sum which plaintiff recovers in case possession cannot be had, and is subject to all the conditions applicable to said principal sum.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal from order, denying defendant's motion to correct the form of judgment. The facts appear in the opinion of the court.

Butler, Stillman & Hubbard, attorneys, and *Adrian H. Joline*, of counsel, for appellant.

Edgar Whitlock, attorney, and *James Hamilton*, of counsel, for respondent.

BY THE COURT.—SEDGWICK, J.—The action was to recover possession of certain choses in action. The verdict was given on April 17, 1879, for plaintiff, and the jury assessed the value of the property at $3,241.23, but did not assess any damages for the detention. The court ordered that judgment upon the verdict be stayed, and that defendant's exceptions be heard in first instance at general term. The general term overruled the exceptions, and ordered that plaintiff have judgment on the verdict. The clerk entered judgment that the plaintiff recover possession of the property; that in case a recovery of possession cannot be had, then that plaintiff recover from the defendant the sum of $3,241.23, being the value of the property as assessed; no interest was added to this sum, excepting as a following independent clause provided. This clause was: "It is further adjudged that the plaintiff recover from the defendant the sum of $151.60, being interest on the verdict aforesaid, as com-

puted by the clerk of this court, from the time of rendering of said verdict to the time of entering this judgment, and which, added to the amount thereof, makes a totai of $3,392.83."

The defendant's counsel claimed below that the judgment should be modified by striking out the last clause, and adding the interest to the sum which the plaintiff recovered, in case possession could not be had. It seems clear that the form adopted gives an absolute and not a conditional judgment, both for the value assessed and the interest computed on it. This is not correct, and indeed was probably unintentional. On the appeal, the only difference between counsel was in respect of the interest. Section 1,235 of the Code of Civil Procedure contains the only authority the clerk has, to increase a sum awarded by verdict by adding interest. The interest must be added to the sum awarded. The clerk has no power to alter the judgment or any condition of it, in any particular. After the sum is added, it must be left to all the conditions applicable to the principal awarded.

The result of not doing this, in the case here, has been that the clerk has assessed damages when there is no adjudication that the plaintiff is entitled to them, and when the clerk is not empowered to assess them.

The judgment should be modified by striking out the last clause, and by adding the amount of interest to the sum to be recovered, in case possession cannot be had.

Order appealed from reversed, with $10 costs, and disbursements to be taxed, and an order should be entered, modifying judgment as has been stated.

FREEDMAN, J., concurred.

THE SONOMA VALLEY WINE AND BRANDY CO., APPELLANT, *v.* THEODORE LAX, RESPONDENT.

Sale by sample—Evidence.

Upon the trial, the action being for the value of goods sold, the sample by which the sale was made was not produced in court, and the evidence as to it was very vague. The plaintiff offered to read from the deposition of plaintiff's agent the answer to the question: "From what sample of wine did you take your order from said Lax?" which answer was excluded.

***Held*, error, for which a new trial must be granted.**

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal from judgment. The facts appear in the opinion.

Edward S. Hatch, for appellant.

Jeroloman & Arrowsmith, for respondent.

BY THE COURT.—SEDGWICK, J.—The defense was that there had been a breach of a warranty, that the goods, for the price of which the action was brought, would be of a quality equal to a sample shown to defendant. The deposition of plaintiff's agent, who negotiated the sale, had been taken. The plaintiff read from it the question: "From what sample of wine did you take your order for said wine, to said Lax?" The question was objected to as immaterial. The court excluded it. The sample had not been produced in court. The evidence in respect of it had been very vague. The defendant's witnesses had given but a general description, and the plaintiff had a right to a

full and exact statement of what its quality and quantity were, and from what it had been taken. For the exclusion of this question the judgment should be reversed, without passing upon the other exceptions.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

FREEDMAN, J., concurred.

SALVATOR CARO, APPELLANT, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY.

I. *Constitutional Law.*

1. INHIBITION AGAINST TAKING PRIVATE PROPERTY.

(*a*) "Property," as here used, embraces—

1. The free use, enjoyment and disposal of all of one's acquisitions without control or direction.

1. TAKING OF PROPERTY, WHAT CONSTITUTES.

1. From the above definition of property it follows that *the polluting the air of one's dwelling with noisome smells* which renders the enjoyment of life and property uncomfortable, is the taking of property.

1. This, although the smell be not unwholesome.

(*b*) INJUNCTION AGAINST THE VIOLATION OF THE INHIBITION.

1. *Inability to comply with provisions enacted for compensation.*

1. When an act under which a corporation is organized authorizes the taking by such corporation of private property for public use, and provides for the making by such corporation of compensation for the property taken by it, and is therefore constitutional, yet where the taking consists in the daily and continuous interference with a naked incorporeal right incident to tangible property, to the diminution of its free enjoyment, *e. g.*, the polluting the air of one's dwelling with noisome smells, which, although not unwholesome, yet render the enjoyment of life and property uncomfortable—and no compensation is made for such interference, and the corporation's want of ability to make reparation is proved or admitted, an injunction may

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go against the doing or suffering to be done that which causes such interference.

II. *Legislative enactment.*

1. Authorizing the doing or carrying on of a particular act or work, effect of.

(*a*) IT DOES NOT AUTHORIZE THE DOING OF ANYTHING NOT NECESSARILY INCIDENT TO THE ACTS OR WORK AUTHORIZED, WHICH WORKS INJURY TO THE PROPERTY RIGHTS OF ANOTHER.

1. A legislative authority to construct an elevated railroad and to operate it by atmospheric power, compressed air or other power, *does not authorize it to pollute the air* of abutting dwelling-houses with noisome smells or noxious gas, which greatly diminish the enjoyment of the occupation of such houses. Such authority neither directly nor by implication authorizes the infliction of such a grievance. The infliction of such grievance does not appear to be necessary or incident to the exercise of the corporate authority and power.*

1. INJUNCTION. Such grievance not being authorized by the legislative power, and being continuous in its character, and the party inflicting it not being of ability to make reparation, an injunction will go.

Before CURTIS, Ch. J., and SPEIR, J.

Decided April 5, 1880.

This is an appeal from a judgment of the special term on the report of a referee, sustaining a demurrer to the complaint, on the ground that it does not set forth facts constituting a cause of action.

The complaint in brief sets forth that the plaintiff, in 1874, bought a parcel of land, of about one hundred

* Even if the pollution of the air was a necessary incident of exercising the authority conferred, yet the case of Hay *v.* Cohoes Co. (2 *N. Y.* 159), cited by Chief Justice CURTIS, would require the abandonment of the authorized work, unless the act giving the authority made provision for compensation for the injury thereby inflicted, and the company was of ability to make compensation.

feet by half the block on the northerly side of Fifty-third street, between Sixth and Ninth avenues, abutting on said street, from Mr. Talman, for the price of $8,000, and built a dwelling-house thereon at an expense of $30,000, and with his family has resided there from 1875 to the present time; that the title to the land was derived by mesne conveyances from James J. Bertine. That when Fifty-third street was opened to the public in 1838, and the fee therein vested in the city of New York, this parcel of land extended southerly to a line coincident with the present center line of said street, and was, in its entire extent, the property of Bertine; that in opening the street, the city took so much of said land as lay between the line coincident with the center line of said street, and the southerly line of said lot. That it was determined by the commissioners of appraisal that the benefit and advantage to Bertine, by reason of his interest in the land, over and above the loss and damage to him from the opening of the street, and for relinquishing his interest in the land for the purpose of the opening, amounted to the sum of $5.80; that as successor and privy in interest and estate to Bertine, plaintiff is entitled to the undiminished possession and enjoyment of said benefit and advantage, and of such he cannot be deprived without just compensation or due process of law.

Roger A. Pryor, attorney, and of counsel, and *Benjamin F. Butler*, of counsel, for appellant, among other things, urged:—The injury complained of is a taking of property. *a.* In a legal sense, property indicates not the thing owned, but the right to the thing; and it consists in the right to the use and enjoyment of the subject of property. "Property is the right of ownership of any object. The words 'property' and 'possession' bear a double meaning, each signifying the right itself, and

the object of the right. In such expressions as the security of property, infringement of property, the right itself is meant" (*Sir G. C. Lewis, Use and Abuse of Political Terms*, 170). "Taken with its strict sense, property denotes a right—indefinite in point of user, unrestricted in point of disposition, unlimited in point of duration—over a determinate thing. Sometimes it is taken in a loose and vulgar acceptation, as denoting not the right of property, but the subject of such a right, as when a house or piece of land is called my property" (2 *Austin Jurisp.* 817, 818 [London ed.]). "Property is the right to use or deal with some given subject in a manner or to an extent which, though it is not unlimited, is indefinite. In which description is necessarily implied that the law will protect or relieve the owner against every disturbance of his right on the part of any other person" (2 *Austin*, 965 *B. a; Amos Science of Law*, ch. VIII.). The Roman law defines property thus: "*Dominium est jus utendi et abutendi re sua quatenus juris ratio patitur*, (See Laveleye, *op. cit.*, *post*, and 9 *Œuvres de Pothier*, 103, ed. 1861). The French Code thus: "*La propriètè est le droit de disposer et de jouir des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé pas les lois et les reglements.*" Art. 544. "Ownership was in Roman law expressed by the word *dominium*, sometimes *proprietas*. The *dominus* was entitled to the use of the thing (*usus*), to the perception of all the products (*fructus*), and to consume the thing entirely if it were capable of consumption (*abusus*)" (*Sandars Justinian* [Am. ed.], 38). "Property imparts to the owner a power of indefinite enjoyment or use, and contains, among other elements, certain powers of exclusion" (*Poste's Gaius*, II., §§ 1–14, pp. 164, 165; 2 *Ortolan, Legislation Romaine*, 255; 1 *Id.* 653 *et seq.*; 1 *Maynz Cours de Droit Romain*, 692, note

9; *Laveleye, Les Formes Primitive de la Propriete*, 381; 1 *Morulon, Répétitions du Code Civil*, 655; 1 *Pothier*, 35, § 100, and note, 3 ed. cit. *ante*). "Property consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save by the laws of the land" (1 *Black. Comm.* 138). "Property is the right of any person to possess, use, enjoy, and dispose of a thing. The term, although frequently applied to the thing itself, in strictness means only the rights of the owner in relation to it" (SELDEN, J., in Wynehamer *v.* People, 13 *N. Y.* 433; Jackson *v.* Housel, 17 *Johns.* 283, per SPENCER, Ch. J.; Sherman *v.* Elder, 24 *N. Y.* 384, per ALLEN, J.). "The essence of property consists in a right to enjoy, which excludes all others of the human race" (*Schouler on Per. Prop.*, Introduction; *Mills on Em. Domain*, § 31). Hence, "the term 'property' in the constitution includes a right of action for injuries to land proposed to be taken for a public purpose" (Morris *v.* Townsend, 24 *Barb.* 658). So a right of reversion is property, which may not be taken without compensation (Heard *v.* City of Brooklyn, 60 *N. Y.* 242). So, of a right to the use of water power (Bank *v.* Roberts, 44 *N. Y.* 192). So, of an easement over the land of another (People *v.* Haines, 49 *N. Y.* 587; Arnold *v.* Railroad Co., 55 *Id.* 661). So, of the lien of a mortgage (Astor *v.* Hoyt, 5 *Wend.* 605). So, of a riparian right to the use of running water (Gardner *v.* Newburgh, 2 *Johns. Ch.* 161; Yates *v.* Milwaukee, 10 *Wall.* 497). So, of an easement of way over the road of a turnpike company (Troy, &c. Co., 16 *Barb.* 100). So, of a corporate franchise (West River Bridge *v.* Dix, 6 *How. U. S.* 507; Richmond *v.* Railroad Co., 13 *Id.* 71). So, of a right in land subject to the easement of a public highway (Williams *v.* Railroad Co., 16 *N. Y.* 97). So, of the right to hold one's land exempt from a flow of water (Pumpelly *v.*

Green Bay Company, 13 *Wall. U. S.* 166). So, of the right to dispose of property (Wynehamer *v.* People, 13 *N. Y.* 378). So, a contested claim to unliquidated damages is property (Erwin *v.* United States, 7 *Otto* [*U. S.*] 392). "The owner of a lot fronting on a street has a peculiar interest in that street. His title carries with it, as an essential incident, certain valuable and indispensable servitudes and easements, which are as invaluable as his property in the lot itself. And this peculiar right exists as well when the fee of the street is in the public, as when it is in the lot owner" (LINDSAY, Ch. J., in Jefferson, &c. *v.* Esterle Co., 13 *Bush* [*Ky.*] 667, 677). *b.* Since property consists in the right to the use and enjoyment of the thing owned, any restriction or limitation upon that right is a taking of property. A person may be deprived of his property, "although the title be not affected, . . . the material substance be taken or destroyed . . . mold *v.* O'Reilly, 74 *N. Y.* 516). Property c ..sists in the right of the owner to use and enjoy it exclusively, and whatever impairs that right "destroys the notion of property, although the thing itself remain physically untouched" (Wynehamer *v.* People, 13 *N. Y.* 387). "Any injury to the property of an individual which deprives him of the ordinary use of it is equivalent to a taking." Hence "a partial destruction or diminution of the value of property by the act of the government, directly and not merely incidentally affecting it, is, to that extent, an appropriation" (*Cooley Const. Lim.* 544, 545; *Mills Em. Domain*, ch. IV.). "It is not necessary that property should be absolutely taken, in the narrowest sense of the word, to bring the case within the protection of the constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the constitution" (Pumpelly *v.* Green Bay, 13 *Wall. U. S.* 166).

Appellant's Points.

"Where real estate is invaded . . . . so as effectually to destroy or impair its usefulness, it is a taking" (*Id.* 181). "Any contribution made to the sovereign by the subject, greater than his quota or proportion, requires compensation to the subject" (*Puffen.* B. 8, c. 3). "The imposition of a burden upon lands, subjecting them to an easement, in behalf of the public, derogatory to the rights of the proprietor, and depriving him of the full and free enjoyment of them," is a taking of property, for which compensation must be made (People *v.* Haines, 49 *N. Y.* 590). "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it, according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power" (Wynehamer *v.* People, 13 *N. Y.* 398). "Nor is it material to inquire as to the *quantum* of interest; it is enough that some portion of his estate, no matter how small, has been taken" (Taylor *v.* Porter, 4 *Hill*, 140; Seneca *v.* Railroad Co., 5 *Hill*, 170). Hence, in the first case, it was adjudicated that a statute authorizing a private road over another's land, without consent or compensation, was unconstitutional and void. So an exclusive franchise to tolls is taken by the concession of a similar right to another (State *v.* Noyes, 47 *Me.* 189). So, a partial destruction or diminution of value is a taking (Glover *v.* Powell, 10 *N. J. Eq.* 211.) So, depositing stone or rubbish on land is a taking (East *v.* Schollenberger, 54 *Pa. St.* 144). So, acquiring an easement to run on another's road (Jersey, &c. *v.* Railroad Co., 20 *N. J. Eq.* 61). So, the destruction by the State of a waterfall on a private stream (People *v.* Canal Appraisers, 13 *Wend.* 355; reversed, 17 *Wend.* 571, but on another point). So, changing a private into a public stream (Morgan *v.* King, 35 *N. Y.* 454). So, digging

a ditch by authority of the legislature on the land of a private owner (People *v.* Nearing, 27 *N. Y.* 306). So, in appropriating land by the public to allow nothing for the widow's right of dower (Matter of ———, 19 *Wend.* 678). So, in laying gas pipes in a country highway (Matter of the Petition, 62 *N. Y.* 386); or constructing a sewer in the street of a city (Kelsey *v.* King, 33 *How.* 39. So, depriving one of the use or enjoyment of property (Matter of Bushwick, 48 *Barb.* 9, 12). So, as against the owner of the fee, interfering with his use of trees in the highway (Village *v.* Richardson, 4 *Lans.* 136, 141). So, any act affecting the absolute and exclusive enjoyment of property (People *v.* Platt, 17 *Johns.* 195). So, building a railroad across a turnpike (Seneca *v.* Railroad Co., 5 *Hill*, 170). So, any encroachment upon property, or disturbance of its possession or enjoyment (Brooklyn, &c. *v.* Armstrong, 45 *N. Y.* 245). So, flooding land by excavating for a railroad (Robinson *v.* Railroad Co., 27 *Barb.* 512). So, causing consequential damage to adjoining property by erecting a railroad embankment (Mahon *v.* Railroad Co., *Hill & Denio*, 156). So, abridging a husband's interest in his wife's property (White *v.* White, 5 *Barb.* 474; Westervelt *v.* Green, 12 *N. Y.* 202. And see Eaton *v.* Railroad Co., 12 *Am. R.* 153, *et seq.*, for additional illustrations of what constitutes a taking of property). "That which belongs to the citizen in the sense of property, and as such has to him a commercial value, cannot be destroyed or deprived of its essential attributes" (Wynehamer *v.* People, 13 *N. Y.* 386). "An act that works the essential loss or destruction of property is a taking of property" (*Id.* 387). "All property is alike in the characteristic of inviolability" (*Id.* 385). Summing up the effect of the authorities, Mr. Wood says: "It may not always be easy to determine what really amounts to a taking of property, but it is safe

to say that whenever the exercise of the right operates to destroy an easement incident to real property, or operates as an actual physical invasion of property by some agency that produces injury thereto, or imposes a burden thereon, that this is a taking of property" (*Law of Nuisances*, § 755). In this case respondent is doing an act upon its own land which restricts and burdens appellant's use and enjoyment of his; and this is the very definition of an easement (CHURCH, J., in Pierce *v.* Keator, 70 *N. Y.* 421; *Goddard on Easements*, 1). But "An easement is property, and cannot be created without compensation" (SMITH, J., in Eaton *v.* Railroad Co., 12 *Am. R.* 154). *c.* Bellinger *v.* New York Central R. R. Co. (23 *N. Y.* 42), is distinguishable from the present case in this essential particular, viz.: "The railroad company had acquired title to the land occupied by the track of its road, and the plaintiff has received payment for the value of his portion of that land, and for his damages in consequence of the road having been laid out through it" (Furniss *v.* Railroad Co., 5 *Sandf.* 551). But appellant has had, and could have had, no indemnity for the injury inflicted on his property by respondent. He was paid originally only for the value of the land taken for a street in its ordinary use; but the construction and operation of respondent's road, which is the cause of his injury, constitute a new use, an additional burden, and an unanticipated injury (Williams *v.* Railroad Co., 16 *N. Y.* 97; Mahon *v.* Railroad Co., 34 *Id.* 658; Craig *v.* Railroad Co., 39 *Id.* 404; Broisted *v.* Railroad Co., 55 *Id.* 220; Wash. Cem. *v.* Railroad Co., 68 *Id.* 591). In Lawrence *v.* Railroad Co. (16 *Adol. & Ell. N. S.* 643), it was held that damages not foreseen, and occurring from some subsequent injury, are not included in the original compensation (Furniss *v.* Railroad Co., 5 *Sandf.* 551). So that the opinion in Bellinger's case, so far as adverse to appellant's claim, was *obiter*, and it has

since been distinctly repudiated by the court of appeals. Pumpelly *v.* Green Bay (13 *Wall.* 166) enunciates the contradictory opposite of the doctrine in Bellinger *v.* Railroad, and in 1878 the court of appeals recognize "the soundness of the view taken by the United States supreme court," and "fully approve it" (Bertholf *v.* O'Reilly, 74 *N. Y.* 516). Moreover, in Bellinger's case, p. 51, the court pointedly distinguish "consequential damage" from the effects of a direct invasion of property. In Kellinger *v.* Railroad Co. (50 N. *Y.* 206), the complaint was of an obstruction to the street, interrupting plaintiff's access to his premises, and the court held that an action would not lie for "a mere inconvenience" in the use of the street. The case is unlike the present in every material circumstance. But, in the conclusion of his opinion (p. 212), the learned chief judge uttered the significant warning: "While we feel bound to hold that this action cannot be maintained upon the allegations of the complaint, we do not intend to determine that there are no circumstances which will justify an action." Bertholf *v.* O'Reilly (74 *N. Y.* 509), involved no question in the law of eminent domain, but merely vindicated an exertion of the police power in regulation of trade and the use of property, as to the constitutional validity of which there cannot be serious controversy (*Cooley Const. Lim.* 572; Lindenmuller *v.* People, 33 *Barb.* 548). People *v.* Kerr (27 *N. Y.* 188), touched only the question of the rights of the abutting owners in the soil of the street, and does not affect the claim for injury to adjacent property. In the Northern Transp. Co. *v.* City of Chicago (United States Supreme Court, October Term, 1878, unreported) the claim was that by the construction of an improvement along the line of the street, a public nuisance was created to the damage of plaintiff. The court held, in conformity with all authorities, that a public nuisance is not predicable of an act authorized

by the legislature, and that plaintiff could not recover for a mere "consequential" injury, in being obstructed in access to its premises. "There was no direct encroachment on private property; all that was done was to render, for a time, its use more inconvenient." But here is a direct encroachment, by the emission of stenches and the explosion of sound, on appellant's property; the injury is not a mere inconvenience, but a destruction of the enjoyment of property, involving an enormous depreciation of its value, and the injury is not temporary, but permanent. The case is essentially distinguishable from the present. In Radcliff *v.* Mayor (4 *N. Y.* 200–203), the injury resulted from digging in defendant's ground, thereby removing lateral support from plaintiff's land; but he had no right to such support, and thus, in the use of its own property, defendant infringed no right of another. Here respondent violates the right of appellant to the use and enjoyment of his property exempt from disturbance by darkness, noise and stench—a right universally recognized and scrupulously protected by the courts. For a criticism on the doctrine of Radcliff's case, see *Sedgwick on Dam.*, 112. *d.* Upon the original acquisition of appellant's land by the public, he was not compensated for the injury of which he now complains. But that this injury, though merely a depreciation in value of his remaining property, resulting from the use to which the parcel taken is subjected, is an injury for which compensation must be made, is settled by adjudication. "When land is taken for the construction of a railroad, the compensation to be paid therefor is not limited to the actual value taken, and to the depreciation of the residue of the lot from which it is taken; but the owner is entitled to recover, also, for any depreciation caused by the use to which it is appropriated;" *e. g.*, "if its value is diminished by the noise and smoke caused by the use of the rail-

road, this circumstance is to be included in the estimate of damages. And neither the legislature nor the courts can authorize the taking of a portion of his property for a use which will be injurious to the residue, without affording him a compensation for all such injury" (Matter of Utica & S. R. R. Co., 56 *Barb.* 456, 457; Furniss *v.* Railroad Co., 5 *Sandf.* 551; Rochester *v.* Budlong, 6 *How. Pr.* 467; Morris *v.* Townsend, 24 *Barb.* 638; 39 *N. Y.* 179, per WOODRUFF, J.). In the matter of the Prospect Park, in 16 *Hun*, 261, land had been taken for a highway, and nothing paid for it besides benefits accruing to other property from the opening of the avenue. Afterward, under an act of the legislature licensing the use of the highway by a railroad, the question came whether the railroad should make additional compensation. Held, that "the compensation for the additional burden imposed by the railroad should be the same as if the highway had not been opened, and that the owner was entitled to recover for any depreciation in the value of his remaining property caused by the use to which the land taken is appropriated."

II. Even though there be no taking of appellant's property, the injury alleged and admitted is an actionable wrong, of which the appropriate redress is by injunction. 1. The darkness, stench and noise distinguished as the causes operating the injury to appellant, are admitted to be the immediate effect of appellant's acts. But science reveals that darkness, stench and noise are, each, the material effect of the physical energies of nature. Hence, the injury to appellant is the effect of physical force directly applied by respondent, and is not, in any sense, an "incidental" or "consequential" injury. In the ultimate analysis, matter is but a form of force or of motion. Damage done by a missile is not more a material injury than damage inflicted by the vibration or emission of particles in light, sound

and smell. But a stone cast upon one's land furnishes a ground of action (Hay *v.* Cohoes Co., 2 *N. Y.* 159). 2. Apart from the admission in the pleadings, human experience testifies to the mischievous operation of darkness, stench and noise upon the enjoyment of life and property (*Babbage on Street Nuisances, passim*). Cicero, it is true, regretted the *fumum, et opes, strepitumque Romæ:* but he was then languishing in exile. Though the citation be not an authority obligatory on the court, it may relieve the tedium of forensic discussion to recall the *strepitus nocturnos atque diurnos* of Horace, and the still more energetic outburst of Juvenal: *Magnis opibus dormitur in urbe:* (*Inde caput morbi, &c., III. Sat.*). That the effect upon the "enjoyment of life and property" by noise, stench and darkness constitutes an actionable injury, is an incontrovertible proposition of law (Fish *v.* Dodge, 4 *Denio*, 311; Bradley *v.* Gill, *Lutwytch*, 69; First Baptist Church *v.* Railroad Co., 5 *Barb.* 79, decided Nov. 1848, after Trustees *v.* Railroad Co., 6 *Id.* 313, May, 1848; Tipping *v.* St. Helen Co., 11 *H. L. Cas.* 648; Gullick *v.* Tremlett, 20 *Weekly Rep.* 358; Inchbald *v.* Barrington, 4 *L. R. Chan. App.* 388; Elliotson *v.* Feetham, 2 *Bing. N. C.* 134; Brady *v.* Weeks, 3 *Barb.* 157; Jones *v.* Powell, 1 *Hutt.* 135; Peck *v.* Elder, 3 *Sandf.* 126, 129, per WALWORTH, Ch.; Catlin *v.* Valentine, 9 *Paige*, 575; Hutchings *v.* Smith, 63 *Barb.* 252; Alfred's Case, 9 *Coke*, 58 b; Morley *v.* Praynall, *Cro. Car.* 510; Styman *v.* Hutchinson, 2 *Selwyn*, 1068; Pickard *v.* Collins, 23 *Barb.* 444; Francis *v.* Schoelltope, 53 *N. Y.* 152; Howard *v.* Lee, 3 *Sandf.* 281; Campbell *v.* Seaman, 63 *N. Y.* 569; Mulligan *v.* Elias, 12 *Abb. Pr. N. S.* 259; Prescott's Case, 2 *City Hall Rec.* 161; Cropsey *v.* Murphy, 1 *Hilt.* 126; Reed *v.* People, 1 *Park. Cr.* 481: Ball *v.* Ray, 8 *Ch.* 467; Scott *v.* Firth, 4 *F. & F.* 349; Sampson *v.* Smith, 8 *Sim.* 272; Imperial Co. *v.* Broadbent,

7 *H. L.* 600). Injury to adjacent property from the noise, smoke, &c., of a railroad on a street, constitutes, at common law, an actionable wrong (Chamberlain *v.* Railroad Co., 2 *Best & S.* 605, 617; Beckett *v.* Railroad Co., *L. R.* 3 *C. P.* 82; Brand *v.* Railroad Co., *L. R.* 2 *Q. B.* 223; Eagle *v.* Railroad Co., *L. R.* 2 *C. P.* 638). 3. If it be argued that the act causing the injury to appellant is not actionable, because authorized by the legislature, we reply: 1st. The authority given to respondent will be strictly construed in protection of private right (Powell *v.* Tuttle, 3 *N. Y.* 396, 401; Matter of Boston, &c., 53 *N. Y.* 579; Washington Cemetery *v.* Railroad Co., 68 *N. Y.* 591; Brooklyn *v.* Armstrong, 45 *N. Y.* 239; Brown *v.* Railroad Co., 12 *N. Y.* 491). 2d. *Non constat*, but the legislature intended compensation for the injury. "If there are private rights which are to be taken, within the meaning of the Constitution, then such rights must be taken in pursuance of law, upon making compensation." "Hence, it seems to me that there is no room for doubt that ample provision is made for compensation for any property, rights, &c." (EARL, J., in Matter of New York Elevated Railroad Co., 3 *Abb. New Cas.* 426, 427; CHURCH, Ch. J., in Gilbert Elevated Railroad Co. *v.* Anderson, 3 *Abb. New Cas.* 447, 448). "ALLEN, J., was of the opinion that unless the statutes under which the corporation claimed to exercise its privileges did make provision for compensation for every property right and interest, whether corporeal or incorporeal, which would be invaded or appropriated, they could not be sustained." "The statutes . . . make ample provision for full compensation for every property right or interest which will be destroyed, or the beneficial use of which will be disturbed or interfered with, by the construction and operation of the railway. Nothing short of this would have satisfied the mandate of the Constitu-

tion, forbidding the taking of private property for public use without just compensation" (ALLEN, J., 3 *Abb. New Cas.* 449). In both cases the court held that the acts under which respondent is incorporated make provision for compensation. 3d. Authority to construct and operate respondent's railway in the street avails only to efface from the act the character of a public nuisance, and is ineffectual to justify the injury to appellant. "The franchise and purpose of the charter was . . . to give the corporation the right to occupy the streets *quoad* the public franchise, and make that lawful which, but for the grant, would have been a nuisance, as an obstruction to a public street" (ALLEN, J., 3 *Abb. New Cas.* 457, and authorities, *supra*). 4th. "If it," the act incorporating the company, "goes further and authorizes the seizure of private rights of property of any kind, and the appropriation thereof, without compensation, it is unconstitutional, and therefore void" (ALLEN, J., 3 *Abb. New Cas.* 433, and ANDREWS and RAPALLO, JJ., same page; People *v.* Westchester, 4 *Barb.* 64; authorities *supra;* Breevort *v.* Grace, 53 *N. Y.* 255; Matter of Rhinelander, 68 *Id.* 107). 5th. Upon this point Hay *v.* Cohoes Co. (2 *N. Y.* 159), is an explicit and decisive authority (First Baptist Church *v.* Railroad Co., 5 *Barb.* 79, overruling, in effect, the previous case, of Trustees *v.* Railroad Co., 6 *Barb.* 313; Selden *v.* Co., 24 *Id.* 362; People *v.* Co., 64 *Id.* 55; Delaware Co. *v.* Lee, 2 *Zab.* 243).

III. The case, then, is this: By respondent's act, and for its emolument, appellant's property is so disturbed and impaired in the use as to destroy the comfort of its enjoyment, and indefinitely diminish its value; and for the loss he receives no equivalent of any kind or in any degree. Here, indisputably, is a wrong for which, in justice, there should be some redress. It is said the loss is inflicted in the interest of the public,

and *salus populi suprema lex*. But the power of the sovereign people in our system of government to appropriate the property of the citizen is fettered and stayed by the organic condition that it be paid for (Breevort *v.* Grace, 53 *N. Y.* 255; 1 *Black. Comm.* 139; 13 *N. Y.* 386, 387). If the improvement be of benefit to the public, the public should pay for it, and the loss should not fall exclusively upon the citizen to whom it is an uncompensated injury. "Were the transaction between individuals, every one could at once see its injustice. It is the public interest supposed to be involved that begets the difficulty; and it is just for this reason that the Constitution interferes for the protection of individual rights" (SELDEN, J., in Williams v. Railroad Co., 16 *N. Y.* 110). "No prerogative of sovereign power should be watched with greater vigilance, than that which takes private property for public use; and all the requirements authorizing its exercise must be strictly pursued" (Dykman *v.* Mayor, 5 *N. Y.* 439). "Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights (COMSTOCK, J., in Wynehamer *v.* People, 13 *N. Y.* 386). Again, "where rights are acquired by the citizen, there is no power in the government, in any of its branches, to take them away," without compensation (*Id.* 393). The injury which respondent admits it has inflicted upon appellant is "a species of despotism which ought not properly to be perpetrated in a government which claims to protect property equally with life and liberty. . . . The few are powerless against the legislative encroachments of the many. . . . The majority are never backward in consenting to and even demanding improvements which they may enjoy without expense to themselves. . . . The system operates unequally and unjustly, and leads to oppression and confiscation"

Respondent's Points.

(CHURCH, Ch. J., in Guest *v.* City, 69 *N. Y.* 516, 517).*

Porter, Lowrey, Soren & Stone, attorneys, and *Grosvenor P. Lowrey* and *John K. Porter*, of counsel, for respondent, upon the grounds taken by the learned judge in deciding the case, urged :—I. It is well settled that no private property or interest is taken (within the meaning of article 1 of section 6 of the Constitution), when a new use is imposed upon the lands in such streets. 1. It is an axiomatic principle of social order that private property must be surrendered by the private owner when needed for the public use. This is part of the general doctrine universally assented to in all civilized societies, that the individual is less than the State, and that private interests must give way, even to the point of being destroyed, where that is required by the general public good. One special exception or qualification of this principle has, however, been always admitted as equally just and necessary with the principle itself, namely, that private property needed for the public use must be paid for before it is taken ; and this qualification has been found capable of being expressed in written law. The taking of property is probably, however, but a small part of the injury which special interests from time to time receive as the direct or indirect effect of things done for the public good. Thus, the value of a toll bridge or ferry is prejudiced and perhaps destroyed by the erection of another, especially a free bridge or ferry, in its vicinity ; and the loss in such a case may be no less than if the private bridge were actually appropriated in the public name. Yet it has never been supposed that such injuries must be compensated for before the

* The brief on appellant's part, as to what constitutes property, is so elaborate and instructive, that it was thought to be useful to the profession to report it in full.

general public could enter upon the enjoyment of the improved facilities. This liability to prejudice by the introduction of new and better means to accommodate the public is one of the chances to which the individual is always subject, and for which, in countries where the common law prevails, no general system of redress has yet been adopted. It may happen that the injury is one so great and palpable that it becomes a duty of the law-making power to distribute the burden among the general public rather than leave it to be borne solely by those upon whom it first falls. This must always be a question of statesmanship, to be especially considered as the occasion arises, and can never with safety be dealt by general provisions of law. Thus, while it is competent and not too inconvenient for practical application, that railroad companies should be required to pay for all land taken by them before the construction of their roads, yet it might well happen that the imposition of an obligation to compensate for all the more or less intimate effects of building a railroad would have but one result, namely, to prohibit altogether the needed public improvement. When such a road is a public use, and when especially it is, as in this case, a vital public necessity, the public interest outweighs the private injury. It would be unfortunate if in such a case the courts should find themselves compelled to assess all the more or less remote and more or less certain injuries anticipated by fearful property owners, upon the private interests engaged in fostering a public enterprise. This road has been actually built since this action was begun, with the effect to show what would have been lost to the world if it had been understood in advance that not only property taken but all indirect injuries to property not taken must be paid for before the capital invested could have any return. One hundred millions has often been claimed as the amount of damage suffered by property owners on or near the defendant's line.

This estimate would, no doubt, be largely modified now, but still would remain large enough to consume more than the entire capital of the road. The doctrine sought to be upheld here would have been prohibitive of the enterprise at any time ; and thus a benefit of thousands of millions to the community would have been lost.

II. The construction and maintenance of the defendant's road being authorized by law, cannot be the cause of legal injury to any person, nor the subject of any action for damages or restraint. And the operation of the same, when completed, can be made the subject of action for malfeasance or misfeasance only. The various legislative acts and proceedings thereunder, which are set forth in the complaint, establish in the clearest manner a right in the defendant to do that which the plaintiff seeks to enjoin ; and this right has been confirmed by the decision in this court, in the Sixth Avenue Railroad *v.* Gilbert Elevated Railroad, and by the court of appeals in the case of the Gilbert Elevated Railroad *v.* Anderson. The authority given and thus approved is to construct, maintain and operate an elevated steam railway. Whatever is legitimately implied in the idea of such a railway was contemplated by the legislature and permitted. The thing first contemplated was the erection through the public streets of an iron railway structure. Whatever obstruction of light and air was naturally incident to the occupation of so much vacant space by a structure of that character was contemplated by the legislature, and if it had power, was authorized. If it had not power and this obstruction was not authorized, the offense is a public nuisance, actionable in the name of the people only, and not in the name of any private citizen. The operation of the railway was to be by steam. This implied necessarily the use of boilers, engines, and such other mechanism and methods as are necessary or usual in the propelling of carriages upon railway

tracks by steam. Whatever noise or stench naturally and usually result from the use of such engines in such a business was contemplated by the legislature, and, in like manner, authorized. It is undoubtedly the duty of every railway company to use approved agencies for reducing, as much as possible, these necessary annoyances. Having done this, all of such annoyances which cannot be entirely suppressed are a part of the natural, necessary, and therefore excusable accompaniments of the prosecution of a useful and necessary business. A single ice cart rattling over a Broadway pavement makes more noise than any elevated railway train. It is not possible that goods and passengers should be moved in a city like this, without causing more or less discomfort and inconvenience to those who are not engaged in the removal. These are inconveniences inseparable from life in a large, crowded and busy city. The defendant, unlike many others who are engaged in useful and lawful occupations, which, nevertheless, offend the vicinity in which they are carried on, has no choice as to the place in which it will prosecute its business. The soap factory, and other lawful but offensive kinds of business, may be removed to a distance from human habitations, but this railroad has been located by act of law in Fifty-third street, and must either pass through there or fail altogether. The route was not even suggested to the legislature by the promoters of the company, but was, after careful deliberation, selected by a commission of five eminent citizens: Henry G. Stebbins, Major-General Quincy A. Gilmore, Shepard Knapp, Chester A. Arthur and General John A. Dix, who made this selection under the express injunction of the act to "designate and establish the same in such manner as shall, in their judgment, be convenient and necessary for such project, and with the least inconvenience to those who occupy premises adjacent, and upon the

said streets, thoroughfares and places in, through and along which the said elevated railway may be so established and maintained." The commissioners were thus called upon to perform a judicial function, and by their location of route have determined that to be the best route upon all the considerations imposed upon them by the act. It thus appears upon the record that a railroad being judged by the legislature necessary, and its erection a public use, the street in question was chosen as one of those in which least inconvenience to the interests of adjoining owners would happen, and that the annoyance by "consequent" (that is to say, natural and necessary) noise, stench, obstruction of light and of air was contemplated and permitted. This action, therefore, is not brought to restrain any abuse of the company's rights, or negligence in the performance of its duties, but to test the question, pure and simple, whether a railroad company, lawfully incorporated and fully empowered by the legislature, can build a railroad through a street laid out and opened in the city of New York, under the Act of 1813, without first obtaining the consent of all persons owning property abutting on said street. If such an action can be maintained, it must be upon the ground that the owner of a street lot has, as such, some estate or interest in the land of the street which may be the subject of appropriation (a claim which has already been shown to be unfounded); or that he is protected by the terms of some trust arising under the Act of 1813, in his favor specially (a claim which has also been shown to be without foundation); or that he is the possessor of some easement or interest appurtenant to his fee-simple title which gives him a separate and personal right to a voice in determining what, if any, new uses the street may be put to; or that he is, by virtue of a contract to be gathered from all these circumstances (and which is protected by the Constitu-

tion of the United States), guaranteed against the imposition of any new burden upon the land, or the application of it to any new use even by legislative authority, without his consent.

SPEIR, J.—The action is brought on the equity side of the court to restrain the committing a nuisance, and for the redress of wrongs and injuries which will involve the plaintiff in vexatious litigation. The issue presents a naked question of law arising on a demurrer to the complaint, where the facts, if properly pleaded, are admitted.

The contentions on the part of the plaintiff and appellant are: *First.* "That the owner and occupant of a lot of land and dwelling-house abutting on the street, has a right to the use and enjoyment of such lot and dwelling-house free from the disturbance and invasion of such right, which is admitted by the demurrer; and that such disturbance and invasion constitute a *taking of property* in the sense of the constitutional inhibition. *Second.* Independent of such constitutional guaranty, the injury inflicted by the defendant upon plaintiff's lot and dwelling-house, as set out in the complaint, and admitted by the demurrer, constitutes a wrong entitling him to relief by injunction."

It is claimed by the defendant that the propositions above stated are not new, but, on the contrary, have been carefully considered and determined by this court, the court of common pleas, and, as they believe, practically determined by the court of appeals.

It was admitted, and the following concessions were made in advance by the plaintiff's counsel:

1. That the fee of the streets for the purpose named in the act of 1813 is in the city of New York.

2. That the appellant has no easement or other interest in the soil of the street which the respondent invades.

3. That there is a constitutional law authorizing the defendant to build an elevated railroad upon the street in front of appellant's dwelling.

4. That under the law there are no restrictions as to the manner of building or operating the railroad—and that the damages which may be recovered must be for injuries directly or immediately caused by the construction or operation of the road, in the manner in which it is or may be hereafter constructed or operated, and not remote and consequential.

We have examined the decisions in the court of appeals and others, to which we have been referred, but in none of them, as we believe, have the points presented by the appellants been adjudicated.

In the case of Gilbert Elevated R. R. Co. *v.* Anderson (70 *N. Y.* 375), Chief Justice CHURCH, in delivering the opinion, says: "The amount or extent of the damages are questions not properly before the court. . . . . To determine what particular occupation of the streets is to be deemed a legitimate public use involves important and delicate questions. They were very much debated in this court in the surface railroad cases, and the principles adjudicated in those cases will be regarded as obligatory upon the court in deciding future cases." This decision as to this point was concurred in by the other learned judges of the court. This expression of the opinion of the court of appeals amounts to a positive assertion that the points presented for discussion are new and undetermined. Nor can it be maintained that this court, in the case of Sixth Avenue R. R. Co. (43 *Super. Ct.* 292), or the court of common pleas (Patten *v.* New York Elevated Railroad Co., 3 *Abb. New Cas.* 345), relied on by the defendant, are authority in support of its position, since in both cases the points raised by the defendant here as having been adjudicated in those cases, were neither presented nor decided.

Among the principles applied to the surface railroad cases, we refer to an expression of two of the judges in the case reported in 70 *N. Y.*, in Matter of N. Y. Elevated Railroad Co., p. 327. The claim made in the case rested on the assumption that the abutting owners of property upon the streets have property rights therein of which they were to be deprived and for which they are entitled under the constitution to compensation. The answer to this by Mr. Justice EARL was, "Whether they have such property rights, it will not be necessary to determine on this appeal, for the reason that provision is made for compensation." Mr. Justice ALLEN concurring, says: "I am of the opinion that the several acts, as a whole, did make ample provision for such compensation, and that every property right of individuals, including whatever right or interest, by way of easement, appurtenant to these lands or otherwise, owners of lots abutting on the streets have, in such streets, as well as those the fee of which is in the city, under the laws of 1813, as the other streets, must, under the Constitution and the statutes, under which these proceedings are had, be compensated for." The learned judge was further of the opinion, that unless such provision for compensation was 'made by the statutes to individuals for every property right and interest, whether corporeal or incorporeal, which would be invaded in the construction and operation of the railway, they could not be sustained.

The principles applicable to the steam surface railroads are clearly stated by the court in Drake *v.* Hudson River Railroad Co., in 7 *Barb.* 508. This is an early and may be considered a leading case in determining the rights of owners of property bounded on the streets in this city, and the rights of the steam railroad company, in common with others, to use the same, under rules and regulations prescribed by the proper authority. Judge JONES, late chief justice of this

court, whose learning and great familiarity with the subject no one will question, furnishes the leading opinion. He first comes to the conclusion, which has generally been received and adopted by the profession, that the streets of this city were dedicated to public uses, and vested in the corporation upon trust, so that the same should be kept open as public streets for the use of the citizens of New York forever, in such manner in which streets then were or should at any time thereafter be beneficially used by lawful authority for the purpose of public *city streets*. That the common council of the city were vested with the regulation of the streets, and were to prescribe and direct the manner and mode of using them.

After alluding to the then recent introduction of railroads, their great and acknowledged advantages over all other modes of travel, which had brought them into exclusive use, the learned judge proceeds: "Desirable improvements of public utility, and beneficial inventions of general interest, are not to be rejected, suppressed, or arrested, simply because they may in their operation and practical effect occasion to property in their vicinity or within the sphere of their action some contingent, or consequential damage. For when they occur the party aggrieved has a remedy by action at law, and by repetition of such action during the continuance of the grievance, whenever and as often as loss or damage ensue; and with the ulterior remedy which in the case of the presence of tracks in the streets or the running of the cars upon them or other operations of the railroad should be or become a nuisance, or the aggression shall prove to be permanent and without an adequate remedy by action, *this court will be competent to administer its equitable relief by injunction to prevent its continuance or for its removal.*"

It is proper to say that in this case the injunction was dissolved, as it did not appear from the complaint

and affidavits that the mischief was irremediable, which damages could not compensate, and did not reach to the very substance and value of the estate and tend to the destruction of it in the character in which it was enjoyed.

It is urged that no private property or interest is *taken* within the meaning of the constitution, where a new use is imposed upon the lands in such streets (by which is meant the operation of a railroad by steam, elevated above the surface of the street). This, we think, has no special pertinency in the case now before us, since it is conceded that, by the terms of the law, there are no restrictions upon the manner of building, nor as to the manner of operating the road; that it may be operated with any means, in any manner; that the defendant has the right to use the road, although it be a new mode of using the public streets, for the reason that it is one mode of using it; and finally, that the law is constitutional, as it provides under limitations against the injury of private property without compensation, and that if no such provision was made it would be simply void. When the cases of the surface steam railroads were first debated in the courts, the use imposed upon the lands was as *new* and prior thereto as little known or anticipated as the present elevated road. The conclusion reached in all the surface railroad cases was, that merely operating the roads by steam on the surface could not be deemed a nuisance, not because it was a new use of the road, but that the law authorized the use as a mode of travel which did not encroach upon private rights.

It is claimed, when the injury to individual rights of property is very great and plainly perceptible, that it becomes the duty of the law-making power to distribute the burden among the general public, rather than leave it to be borne solely by those upon whom it falls. And it was gravely urged that this must always be a

question of "statesmanship," to be specially considered whenever the occasion arises, as the provisions of law cannot safely deal with it. The Constitution being paramount to the statutes and the laws enacted by the legislature, and intended to protect the citizen in the enjoyment of his property in every possible relation of life, it would seem that the courts alone can dispose of the question, when and how payment for private property taken for public use shall be made. It may be admitted that the burdens imposed upon individuals by legislative enactments may become too oppressive to be patiently borne, but the remedy must only be found with the law-making power of the government. To this question there can be no solution but by an appeal to the fixed and permanent principles of law and equity. It has been well said by the present learned chief justice of our highest court: "We should all regard a departure by the courts from rules of law wisely established, for the protection of all; to meet the equities of a particular case or class of cases, as a far greater evil than that sought to be remedied."

The term "property" is of the largest import, and embraces every mode in which it may be applied to public use, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments. The courts will interfere by injunction to secure to a party the bare privilege conferred by statute (Croton Turnpike Co. *v.* Ryder, 1 *Johns. Ch.* 611; Newburgh Turnpike Co. *v.* Miller, 5 *Id.* 101; Boston & Lowell R. R. Co. *v.* Galena & Lowell R. R. Co., 2 *Gray*, 1). In the last case, SHAW, Ch., J., says, "It is a right or title which, if it exists at all, is purely a statute right; it is created by law, it exists only in contemplation of law, it is invisible, intangible, incapable of physical possession, and depends on the law for its protection." "Any injury to the property of an

individual, which deprives the owner of the ordinary use of it, is equivalent to a *taking*, and entitles him to compensation" (*Cooley on Constitutional Limitations*, 542). Even claims for compensation for the possession, use or appropriation of tangible property, constitute personal estate equally with property out of which they grow, although the validity of such claims may be denied, and their value may depend upon the uncertainties of litigation, or the doubtful result of an appeal to the legislature (Erwin *v.* United States, 7 *Otto*, 396).

It is elementary law that the corrupting the air of a man's dwelling with noisome smells is a nuisance, for light and air are two indispensable requisites to every dwelling. Lord MANSFIELD has said that it is not necessary that the smell should be even unwholesome, it is enough if it renders the enjoyment of life and property uncomfortable (3 *Black. Comm.* 219; 1 *Burr.* 337; Duke of Northumberland *v.* Claus, C. P. at Westminister, 1824, *Chitty*). In a word, we think it may be said that there is an inherent absolute right of property in every man, which consists in the free use, enjoyment and disposal of all his acquisitions without control or diminution, save only by the laws of the land; and "so great is the regard of the law for private property that it will not authorize the least violation of it." Although there are many individual possessions in life denominated in common use and by law *private*, yet when we come to speak of a man's dwelling-house, the abode of his social and domestic life, the word *private* seems to have been used by the early writers in another and more significant sense. In Lemayne's Case (3 *Coke*, 185–91, b) it is said: "The house as to every one is to him as his castle and fortress, as well for his defense *as for his repose.*"

The subject of controversy is a mere naked incorporeal right claimed by the plaintiff to have and enjoy

his land and dwelling-house free from the invasion arising from the constructing and operating an elevated steam railroad, producing noises, stench, obstruction of light and air, causing grievous disturbance to himself and family, thereby rendering his residence undesirable, and greatly reducing the market value thereof. If this right exists and has been invaded, the proper and specific remedy which shall prevent the continuing invasion is by injunction, and is within the ordinary scope of equity jurisdiction. If the plaintiff is disturbed in the enjoyment of his incorporeal right, such disturbance is technically a private nuisance. The complaint, after alleging that if the road be permitted to be built and operated along the street and in front of plaintiff's house and land he will be subject to a continuing nuisance and to wrongs and injuries which will involve him in interminable litigation, and for which damages will afford him no appropriate or adequate relief, continues, "and he is informed and believes the defendant is insolvent and unable to pay any judgment for damages that might be recovered against it, and has mortgaged its entire property for a sum far beyond its value, and that any execution against it would be idle and fruitless." Where insolvency or want of ability to answer for injury to be done, in the party complained of, be averred and proven, the court will grant an injunction. The truth of the above allegations is admitted by the demurrer.

It is claimed that the legislature have legalized this road, and therefore it is not a nuisance. It is admitted it is not a public nuisance, as it would be if the legislature had not legalized it. The statutes effectually protect the company, if it complies with the conditions, from an indictment, and against any interference with its work, as a public nuisance on account of the fee in the streets; but not against claims for private damages arising from injuries to adjacent owners. The

company may occupy the streets, but it must occupy them at its peril, in a way not directly or immediately to injure private rights. In all the surface railroad cases we have examined, while they have held that these roads do not operate as a nuisance, they have clearly, and, we think, unanimously decided that the facts, after investigation, did not authorize a judicial deduction that a nuisance had been proven. In the case of Lexington & Ohio R. R. Co. *v.* Applegate (8 *Dana*, 289), cited by the defendant, the chief justice says, "neither the government of the city nor of the State can license a private nuisance, or take or encroach on private property without the owner's consent or payment of his damages."

No one will question the utility of the elevated railroad as a public improvement of great convenience and accommodation to the city and the public at large, but these accommodations cannot authorize or justify its invasions on the rights of any portion of our citizens. The individual whose property is affected because the road is of great public value, should be indemnified and fully compensated by the public, or by the company, which profits by the improvement, for any loss or damage he has or may sustain. We have seen, and it is admitted that the law has made provision for such indemnity; that the surface railroads have been compelled to pay the damages done to private property in every case where it is proved to have been invaded. The defendant admits the injury and wrongs done to the plaintiff as alleged in his complaint, and its want of ability to make reparation.

We are of the opinion that the appellant is entitled to relief, and that the judgment should be reversed, with costs.

CURTIS, Ch. J.—[Concurring.]—The action is brought to enjoin the defendant from running its trains in front

of the plaintiff's dwelling in Fifty-third street. The occupation of the street, from curb to curb, opposite the plaintiff's premises, by an elevated steam railway, and the deprivation of light and air, and the noise, stench, and the exposure of the privacy of plaintiff's dwelling, and the diminution of the value of the same, in consequence of such occupancy, and the running of trains, are conceded by the demurrer. Upon the argument of the appeal of the plaintiff, from the judgment for the defendant on the demurrer, the plaintiff conceded:

First. That the fee of the street is in the public.

Secondly. That the plaintiff has no easement, or other interest in the soil of the street which defendant invades.

Thirdly. That defendant's railroad is constructed and operated in the street, by due authority of law.

Fourthly. That mere depreciation of the value of the plaintiff's property, by the construction and operation of such a railroad, without the intervention of any physical agency to the injury of such property, would be a consequential damage, for which the defendant is not liable.

These concessions greatly narrow the field of controversy.

The plaintiff rests his controversy on these two grounds:

First. That as owner and occupant of a lot and dwelling-house abutting on the street, he has a right to the use and enjoyment of such lot and dwelling-house, free from the disturbance and invasion of such right, which the defendant admits by its demurrer, and that such disturbance and invasion constitutes a taking of property, in the sense of the constitutional inhibition (Art. 1, § 6).

Secondly. That, independently of such constitutional guaranty, the injury inflicted by the defendant upon the plaintiff's lot and dwelling-house, as stated

in the complaint and admitted by the demurrer, constitutes an actionable wrong entitling him to relief.

Neither the acts of the legislature under which the defendant is incorporated, nor the requirements and conditions imposed upon the defendant by the board of commissioners created by the legislature, confer, or attempt to confer any right or power to introduce into the plaintiff's premises, for instance, the stench or noxious gas, of which, among other grievances, the plaintiff complains, and which, the demurrer admits, will greatly diminish the plaintiff's enjoyment of his dwelling-house. The question is directly raised, whether this is a lawful act on the part of the defendant. Conceding that the defendant has full power and right to enter upon the public street, to construct and operate an elevated railroad there, from what source does it derive the power to thus diminish the plaintiff's enjoyment of his house? The act of the legislature authorizes the defendant to operate its road "by atmospheric power, compressed air, or other power." It, neither directly or by implication, authorizes the infliction of this grievance of a polluted atmosphere, of which the plaintiff complains, and which the demurrer admits.

In the case of Hay *v.* Cohoes Co. (2 *N. Y.* 159), this question was considered. The defendant, also a corporation created by the legislature, dug a canal upon its own land, for the purposes authorized by the legislature in its charter. In doing so, it was necessary to blast rocks, and fragments were thrown against and injured the plaintiff's dwelling, upon lands adjoining. The defendant was held liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. In the opinion of the court, per GARDINER, J., it was considered that the defendant had the right to dig the canal, and the plaintiff the right to the undisturbed possession of his

property, and if the rights conflict, then, on ground of public policy, it was better that the one should surrender a particular use of his land, rather than that another should be deprived of the beneficial use of his property altogether. It is further said, "he may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner." Again, in speaking of the defendants, it was further said: "They could not pollute the air upon the plaintiff's premises (Morley *v.* Pragnall, *Cro. Car.* 510), nor abstract any portion of the soil (*Rol. Abr.* 565, note; 12 *Mass.* 221), nor cast anything upon the land (Lambert *v.* Bepy, *Sir T. Raymond*, 421), by any act of their agents, neglect, or otherwise, for this would violate the right of domain. . . . . No one questions that the improvement contemplated by the defendants upon their own premises, was proper and lawful." "The means by which it was prosecuted were illegal notwithstanding, for they disturbed the rightful possession of the plaintiff, and caused a direct and immediate injury to his property." "For the damages thus resulting the defendants are liable."

The law, as it was administered in that case, seems applicable to the present. The defendant in the case of Hay *v.* Cohoes Co. (2 *N. Y.* 159), constructed the canal, pursuant to the authority conferred by the legislature, as was its right, but disturbed the rightful possession and enjoyment of the plaintiff. In the present case a railroad is substituted for a canal, and in place of fragments of rocks cast upon the plaintiff's premises, stench or gas, disagreeable to the senses,

is diffused through the plaintiff's residence. It is difficult to see any distinction between casting a stone upon plaintiff's premises, or filling his dwelling-house with a noxious gas, so far as constituting a good cause of action is concerned. The gas is, in itself, a material substance, capable of more or less condensation. Take sulphureted hydrogen, for example; what can be more penetrating and polluting to an abode, or more destructive to health and enjoyment? The volatility of a gas cannot change the principle of law by which every individual is entitled to the undisturbed possession and enjoyment of his own property. It is a quality that tends to increase and prolong the injury. No law gives one urban neighbor the right to thus invade the adjoining dwelling of another, and deprive him of the enjoyment of home and health. The legislature has not conferred, or attempted to confer, such a power upon the defendant, nor does the exercise of it appear to be necessary or incident to the operation of the defendant's road.

Whether the defendant has a right to occupy the street from curb to curb, with structures raised for its use, to let them for newspaper stands, or for other purposes, are not the questions before us. But the question is, whether any of the acts of the defendant charged by the plaintiff in the complaint as injurious to his property, and admitted by the demurrer, are unwarranted by law. The pollution of the air in the defendant's dwelling by noisome gases, in the consideration above given to it, comes within the pale of the decision in Hay *v.* Cohoes Co., *supra*, and is a violation of the plaintiff's right of domain, and not included in, or justified by the legislative grants to the defendant, or even necessarily incident to its enjoyment of those grants. If such a broad construction is given to them, as is claimed by the defendant, then the defendant is vested with rights and powers inconsistent with the

protection and enjoyment of property, and unprecedented in their nature. It is the just and reasonable interpretation of the action of the legislature, that no adjacent owner of property should be deprived of the enjoyment of it by an act of the defendant, such as the one we have considered, gratuitous, unnecessary, and in no respect an incident to the proper use by defendant of the grants from the legislature.

To hold that the plaintiff is entitled to no protection, or compensation by law, for the injury the defendant inflicts upon him, and that he is utterly without redress, is inconsistent with the views I am constrained to entertain, as to what constitutes the due administration of justice.

We think the complaint states facts sufficient to constitute a cause of action against the defendant, and that the judgment appealed from should be reversed, with costs.

SARAH E. SLAUSON, *v.* HEZEKIAH WATKINS, APPELLANT, IMPLEADED WITH BENJAMIN L. LUDINGTON, RESPONDENT.

*Motion to charge person beneficially interested, with costs.**

It is within the discretion of the court, and is a proper exercise thereof, to deny, as prematurely made, a motion to charge the person beneficially interested in the recovery in an action (2 *R. S.* 619) with the payment of a judgment for costs entered therein, when an appeal from said judgment is pending at the time said motion is made, though no security upon appeal has been filed, and no stay of proceedings granted. The denial of the motion upon said ground may be deemed equivalent to a stay.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided April 5, 1880.

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* See Merceron *v.* Fowler, p. 350.

Appellant's Points.

This is an appeal by the defendant Watkins from an order made at special term, denying, as premature, a motion which sought to charge the defendant Ludington, who is alleged by the moving papers to be the person beneficially interested in the recovery, and who brought this action in the plaintiff's name, with the judgment for costs, entered against the plaintiff.

The motion was held premature, on the ground that an appeal herein from said judgment, without security or stay, was pending on behalf of the plaintiff.

Oliver N. West, for appellant, urged:—I. Section 44 of the Revised Statutes (vol. 2, p. 619) provides as follows: "Where any action shall be brought in the name of another, by any assignee of any right of action, or by any person beneficially interested in the recovery in such action, such assignee, or person, shall be liable for costs, in the same cases, and to the same extent in which a plaintiff would be liable, and the payment of such costs may be enforced by attachment."

II. The moving papers show beyond any dispute that Ludington brought the action in Mrs. Slauson's name, and that he is the person beneficially interested in the recovery. They show also that the plaintiff, by reason of having given no security on her appeal, nor secured any stay of proceedings, is now liable (notwithstanding the pendency of such appeal) to pay this judgment for costs, and this, notwithstanding the fact, that for her to make such payment now, when the court might hereafter determine the judgment to be wrong, would be a possible hardship. (Execution has in fact, as appears in the moving papers, been issued against the insolvent plaintiff and returned, "no goods.")

III. This, then, is a case in which the nominal plaintiff is now "liable for costs" to the full "extent." If the statute means anything at all, it means that the

liability of the real party shall be co-extensive with that of the sham plaintiff upon the record. In case Mrs. Slauson is now liable, so also, is liable Ludington. To what extent she is liable, to that extent also is he liable. If it be not premature to enforce the judgment against her, neither is it premature to proceed against him. He is the real plaintiff, and her liability is his liability. Having stepped into her shoes, when he found it convenient, in bringing his action, the statute says that he shall stand in them, although he now finds it more convenient to step out of them.

IV. The order affects a substantial right, and is appealable (*Code*, § 1,347; 29 *N. Y.* 634).

George W. Lord, for respondent.

BY THE COURT.—FREEDMAN, J.—It was not only discretionary, but eminently proper for the court below to decline, during the pendency of plaintiff's appeal in the court of appeals, to summarily order the defendant Ludington, as the person who is alleged to have brought the action in plaintiff's name, and to be beneficially interested in the recovery, if any were had, to pay the judgment for costs recovered by the defendant Watkins. The mere fact that at the time of the motion no security on appeal had as yet been filed, and no stay of proceedings had been obtained, did not give Watkins such an absolute right to proceed summarily as to deprive the court of all discretion in the matter. The denial of the motion as premature may be treated as equivalent to a stay of proceedings, granted upon a consideration of the special circumstances of the case.

The order should be affirmed, with costs.

SEDGWICK and SPEIR, JJ., concurred.

Statement of the Case.

HIRAM ALLEN, ET AL., RESPONDENTS, *v.* THE ST. LOUIS INSURANCE CO., APPELLANT.

Marine insurance—construction of policy—effect of agent's approval of manner of lading.

The policy in question purported to be an open and uniform canal cargo policy, and insured the several persons whose names were entered in the book containing it, which remained in the possession of the insurer. The plaintiffs' names, the name of the boat, the voyage, property insured, amount of insurance, rate, &c., were duly entered in said book, and a certificate issued to plaintiffs, stating that they were insured according to the terms of said policy, "inboard cargo boat, *W. S. Alden*," &c. The policy provided that the company should not be liable, unless by special agreement indorsed thereon, for damage to goods on deck; but also provided that it should be lawful for said boats to load in such manner as is customary in such navigation, without regard to marine law or custom applicable to sea voyages, and that the company would make good all loss or damage on goods so laden as aforesaid.

While on the voyage a portion of the cargo, *laden on deck*, was washed overboard and greatly injured.

No special agreement permitting lading on deck was proven, but it appeared that the boat was laden according to custom in canal navigation, and that the authorized agent of the company examined her when about to start, and approved the mode of lading.

Held, that the certificate and policy should be construed together and against defendant, the insurer; that "inboard" is used in contradistinction to "outboard," and means not projecting over the rail of the vessel; that upon the whole case the conclusion is that the policy attached to the goods which were injured; that in any event the defendant was bound by the approval of its agent.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal from judgment entered upon the verdict of a jury, and from order denying motion for new trial.

Appellant's Points.

The action was brought upon a policy of insurance whereby the defendant insured Allen Brothers against loss or damage to a cargo of paper upon the canal boat *W. S. Alden*, on a voyage from Troy, N. Y., to Philadelphia, Pa. The boat was towed to New York, and went alongside a certain pier in the North River. While there, the sea being heavy, the swell of a steamboat rolled her so that she spilled a part of the paper which was on her deck. The loss was thereby occasioned.

No special agreement permitting lading on deck was proven.

The defendant defended on the ground that the policy did not cover goods carried on deck.

Upon the trial the defendant offered no testimony, but at the close of the plaintiff's case defendant's counsel moved to dismiss the complaint upon the ground:

First. That it was not shown that the plaintiffs were partners.

Second. That it was not shown that the policy covered the property lost.

The motion was denied and defendant excepted.

At defendant's request the court submitted to the jury the question whether or not the loss was caused by carelessness on the part of those who had charge of the boat.

The jury found for the plaintiffs.

Defendant then moved for a new trial on the judge's minutes, which motion was denied.

Judgment having been entered, the defendant appealed from the judgment, and also from the order denying the motion for a new trial.

The facts further appear in the opinion of the court.

E. M. Neville, attorney, and *George M. Curtis*, of counsel, for appellant, urged:—I. Goods laden on deck are not covered by a policy of insurance unless

expressly mentioned (Lennox *v.* United States Ins. Co., 3 *Johns. Cas.* 178; 2 *Philips Ins.* 169 *et seq.*).

II. The condition of the policy was not complied with. There was no waiver of the condition. The policy is void. One of the conditions of the policy was as follows: "It is also agreed that the company shall not be liable for any loss or damage to box or bundle, railroad iron or hoop iron, unless total; nor for goods or property on deck, unless by special agreement in writing indorsed on their policy" (Rohrback *v.* Germania Fire Ins. Co., 62 *N. Y.* 47; Matson *v.* Farm Buildings Ins. Co., 73 *Id.* 310).

III. The insurers assuming risks which the insured is unwilling to bear can only be held to those risks for which they have voluntarily and knowingly undertaken, and the insured has no right to substitute any other (2 *Parsons on Ins.* 2; Hartley *v.* Buggins, 3 *Dougl.* 39; Maryland Ins. Co. *v.* Le Roy, 7 *Cranch.* 26). If the defendants were to be made answerable for the property on deck it would be holding it to a responsibility not considered and for which no compensation was given (Blockett *v.* Royal Exch. Ins. Co., 2 *Crompt. & Jer.* 250).

IV. To entitle the plaintiff to a recovery it was necessary for them to show that it was usual for underwriters to pay for goods lost when carried on deck (Taunton Copper Co. *v.* Merchants' Ins. Co., 22 *Pick.* 108).

V. The mere fact of unusual stowage by the insured of goods in a marine policy avoids the policy, if not known and assented to by the insurer (Leitch *v.* Atlantic Mut. Ins. Co., 66 *N. Y.* 100; Merchants' Ins. Co. *v.* Alger, 32 *Penn.* 330; Blocket *v.* Assurance Co., 2 *Crompt. & Jer.* 250; Atkinson *v.* Gt. W. Co., 4 *Daly*, 207; Da Costa *v.* Edmonds, 4 *Campb.* 142; Taunton Copper Co. *v.* Mer. Ins. Co., 22 *Pick.* 108; *Marshall on Ins.* 348, 349; The Delaware, 14 *Wall.* 579, 602).

Opinion of the Court, by FREEDMAN, J.

Man & Parsons, attorneys, and *John E. Parsons*, of counsel, for respondents, urged:—I. "Inboard" is used in contrast to "outboard;" it means cargo not projecting outside the rail of the vessel, and does not mean under deck. The policy is general; permits any mode of lading usual in canal navigation, and expressly provides that the rules applicable to ordinary marine policies shall not apply. If the defendants designed to vary the policy by the certificate, they should have done so in direct and clear terms. The certificate and the policy are to be construed together and against the defendants (McMaster *v.* Pres., &c. Ins. Co. of N. A., 55 *N. Y.* 222; Rann *v.* Home Ins. Co., 59 *Id.* 387; Love *v.* Pares, 13 *East*, 80; Doe *v.* Dodd, 5 *B. & Ad.* 689; Dow *v.* Whetten, 8 *Wend.* 160; Yeaton *v.* Fry, 5 *Cranch*, 335).

II. The agents having approved the mode of lading, the defendants cannot now be heard to claim, that, by reason of the manner in which the paper was loaded, the policy did not apply (Shearman *v.* Niagara Fire Ins. Co., 46 *N. Y.* 526; Carroll *v.* Charter Oak Ins. Co., 38 *Barb.* 402; Bodine *v.* Exchange Fire Ins. Co., 51 *N. Y.* 117; Trustees First Baptist Ch. *v.* Brooklyn Fire Ins. Co., 19 *Id.* 305; Sheldon *v.* Atlantic F. & M. Ins. Co., 26 *Id.* 460; Van Schoick *v.* Niagara Ins. Co., 68 *Id.* 434).

BY THE COURT.—FREEDMAN, J.—There is substantially but one question involved in the appeal which deserves special notice, and that is whether the policy covered the injured property, laden, as it was, on the deck of the boat.

A general description does not, except under special circumstances, cover articles carried upon deck. The articles so stowed are thereby put out of the protection of the policy, unless their being carried in this way is provided for in the policy, or indicated by the description of the article itself in the policy, or justified by

the usage of the specified trade (*Phillips on Ins.* 5 ed. § 460).

Where the article specified in the policy is uniformly so carried, or obviously *must* from its character be so, for its own safety or that of the ship, cargo and crew, the policy will attach to it, so carried, by the merely naming of it and describing the voyage (*Ib.*).

But whether the policy attaches to an article on deck that is merely named, without any express intimation in the policy that it is to be so carried, where articles of the same kind are not necessarily or uniformly so stowed, but sometimes go on deck, and sometimes under, according to the quantity and kind of cargo, is a question on which, as Mr. Phillips puts it, the jurisprudence is wavering and inconsistent.

The policy in question was a general policy, insuring the persons whose names were indorsed or entered in a book kept for the purpose. It purported to be an open and uniform canal cargo policy, and remained in the possession of the defendant, until produced by it at the trial, upon the call of the plaintiffs. It was bound up in book form, with ruled leaves of paper following, upon which to make a note of statements of risks. It provided that the company should not be liable for damage to goods or property on deck, unless by special agreement in writing indorsed on the policy. But it also provided that it should be lawful for the boats insured or carrying insured goods or property, to load in such a manner as is usual and customary for vessels employed in such navigation to be laden; without reference to any provisions on the same subject by marine law or custom applicable to vessels laden for sea-voyages; and that the company would make good and satisfy unto the said insured, all such loss or damage on the said goods, wares, merchandise and country produce, *so laden as aforesaid*, &c., &c.

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The risk in question was entered in the following words:

DATE, 1876	NO. RISK	ACCOUNT OF	NAME OF BOAT	FROM	TO	PROPERTY INSURED	AMOUNT	RATE	PREMIUMS	SIGNATURES OF APPROVAL AND REMARKS
TROY, sion is cargo.	N. gra	Y., Nov. 9 nted to lie	, 1876.—In c in New Yo	onsiderati rk Harbor	on of $2 until M	2.50 e arch 1	xtra p , 1877,	rem for	ium disc	, permis- harge of
Oct. 12	335	Allen Brothers	W. S. Alden	Troy, N.Y.	Phila-delphia	Paper	9,000	40	36	Neher & Calder...P

The certificate issued to the plaintiffs ran as follows:

"$9,000. No. 335.

CANAL CARGO CERTIFICATE.

Incorporated 1837.

THE ST. LOUIS INSURANCE COMPANY,

OF ST. LOUIS, MO.

Cash assets over $350,000.

"This certifies that Allen Brothers insured under and subject to the conditions of open Policy No. 387, issued by the St. Louis Insurance Company of St. Louis, in the sum of nine thousand dollars, inboard cargo of boat *W. S. Alden.*

"On paper $9,000, at and from Troy, N. Y., to Philadelphia.

"$ at and from to

"Loss, if any, payable to themselves or order on return of this certificate.

"J. B. S. LEMOINS, *President.*

"JAMES D. HOUSEMAN, *Secretary.*

"This certificate of insurance is not valid unless countersigned by the authorized agent of the company at Troy, N. Y.

"NEHER & CALDER, *Agent.*

"Troy, N. Y., October 12, 1876.

9,000—46—36.00."

Opinion of the Court, by FREEDMAN, J.

This certificate and the policy are to be construed together and against the defendant. "Inboard" is used in contrast to "outboard." It does not necessarily mean under deck, but seems to mean a cargo not projecting over the rail of the vessel. No evidence explanatory of its meaning was given or offered at the trial. Under all the circumstances it is therefore but fair to hold, and especially as the policy was general and permitted any mode of lading usual in canal navigation, and expressly provided that the rules applicable to ordinary marine policies should not apply, that if the defendant intended by the certificate to limit the insurance to the cargo under deck, it should have said so in clear terms.

The paper was taken on board the *Alden* at Troy. About sixty tons were on deck, stowed inside of the rail about six inches. It was protected by tarpaulins tied down on both sides, and according to the proof it was carefully laden in the manner usual and customary for vessels employed in the navigation in which the Alden was engaged.

Upon the whole case the conclusion seems irresistible that the policy attached to the goods which were injured. But if any doubt could still exist, such doubt has been wholly removed by the further proof which was given, that the authorized agents of the defendant at Troy were informed how the paper was laden and secured, and that there was a portion on deck; that they were requested to come and look at it, and that they said they thought it was all right. This being an approval of the mode of lading, in consequence of which the boat proceeded on her voyage, the defendant's present claim that, by reason of the manner in which the paper was stowed, the policy did not attach to the injured goods, is both unreasonable and untenable.

As to the question of plaintiff's partnership it is

sufficient to say that the proof upon the point, uncontradicted as it stands, is sufficient.

The judgment and order should be affirmed, with costs.

SEDGWICK, J., concurred.

FREDERICK A. POTTS, RESPONDENT, *v.* ISAAC MAYER, IMPLEADED, &C., APPELLANT.

Evidence—Code of Civil Procedure, § 829.

When the testimony of a deceased party to a former action, given in said action, is read upon the trial of a subsequent action by a party thereto (*Code Civ. Pro.* § 830), the case does not fall within the saving clause to section 829 of Code of Civil Procedure. The said party to the subsequent action is precluded from testifying as to the matters contained in said testimony, so far as specified in said section 829.

Before SEDGWICK and FREEMAN, JJ.

Decided April 5, 1880.

Appeal from judgment. The facts appear in the opinion.

Benj. F. Carpenter, attorney, and *Payson Merrill*, of counsel, for appellant.

Richard S. Newcombe, attorney, and *Albert Cardozo*, of counsel, for respondent.

BY THE COURT.—FREEDMAN, J.—The action was brought against the defendant Isaac Mayer, on a note made and indorsed by the firm of Hyman & Mayer, of which said defendant was at the time a member. It was conceded on the trial that the plaintiff stands in no better position than Kohn, from whom the plaintiff

derived title, would have stood, if Kohn had brought the action as indorser. But the production by the plaintiff on the trial of the note indorsed to him, *prima facie* established his title to and interest in the note, and entitled him to a recovery under the decision of this court in Freeman *v.* Falconer (45 *Super. Ct.* 383).

The court therefore properly directed a verdict, unless sufficient evidence was given of an affirmative defense to carry the case to the jury.

Upon this point the defendant, Mayer, held the affirmative of the issue, and to prove the diversion of the note by Kohn, he read the testimony of his former co-defendant, Hyman, as that of a witness who had died since the former trial, and the said testimony showed not only a diversion, but also that Hyman had paid Mayer value for the note. The latter fact therefore neutralized the former. Mayer then offered to testify that Hyman's testimony as to payment of value was not true, and his testimony offered upon this point was excluded. There was no error in this ruling. It being conceded that the note had, with Mayer's assent, been executed, indorsed and delivered by Hyman, the proposed testimony was incompetent under section 829 of the Code of Civil Procedure, which prescribes that a party to an action, or a person interested in the event, shall not be examined, as a witness, in his own behalf or interest, against a person deriving his title or interest from, through, or under a deceased person by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person. Nor did the testimony come within the saving clause of that section, because Hyman was Mayer's own witness. The exception made by that clause would have applied only if the plaintiff, upon the said question of value, had been examined in his own behalf, or had read the testimony of Hyman as part of his case.

Appellant's Points.

The defendant having failed in his defense, the judgment should be affirmed, with costs.

SEDGWICK, J., concurred.

FRANCIS A. ROBBINS, RESPONDENT, *v.* HENRY F. PULTZS, APPELLANT.

Attorney and client—Evidence.

In an action brought by a client against her attorney, to recover moneys alleged to be wrongfully detained by him, the main fact at issue was whether a certain sum of money was paid by her to the attorney in satisfaction of his charges for services, &c., or whether the said sum was delivered to him upon the understanding that part thereof was to be received in full satisfaction of his said charges, and the remainder to be used in settling certain claims which were (as alleged by the client) falsely stated by said attorney to exist,—*Held*, error to refuse to charge that the jury might consider the value of the attorney's services, and the disbursements incurred by him for said client, as having a bearing upon the probabilities of the case.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal from judgment and order denying motion for new trial.

H. F. Pultzs, appellant, in person, and *Erastus New*, of counsel, among other things, urged:—The refusal to charge that the jury might consider the value of the services rendered by the defendant to the plaintiff and the amount of the disbursements in determining whether defendant consented to accept $500 in full for his services and disbursements, was clearly error, and under the rule laid down in Cohen *v.* Kelly (35 *Super. Ct.* 42), a new trial should be granted. In

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Cornell *v.* Markham (9 *Week. Dig.* 31), it was held that "when the terms of a contract are in dispute, the value of the things about which the contract is made may be shown as bearing upon the question of probabilities." See also, Kavanah *v.* Wilson (70 *N. Y.* 177; Jobes *v.* Parsons, 9 *Week. Dig.* 11).

Royal S. Crane, for respondent.

BY THE COURT.—FREEDMAN, J.—This action was brought to recover the sum of $500, wrongfully detained, and upon the trial the true issue was, whether plaintiff's consent to a certain settlement between the parties was obtained by the defendant as her attorney by the false statement that, in addition to the sum of $500 paid to Valentine, which was conceded to have been paid, the further sum of $500 had to be paid to Jackson as the attorney of Swift, and that this left only $500 for defendant's services and disbursements, or whether it was obtained upon the understanding that the defendant might retain $1,000 for his services and disbursements. Upon this issue there was a sharp conflict of testimony, and the jury had a right to look at surrounding circumstances inclusive of probabilities. The extent of the services rendered and of the disbursements incurred by the defendant for the plaintiff was a fact which had a material bearing upon the question of probabilities, and the jury should have been instructed, as defendant requested, that they might consider the value of such services and the amount of such disbursements in determining whether the defendant consented to accept $500 in full for his services and disbursements as claimed by the plaintiff. They should also have been instructed, as defendant requested, that if they found that the amount agreed to be paid for such services and disbursements was $1,000 instead of $500, the defendant was entitled to a verdict. In re-

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fusing these requests and submitting the case to the jury upon the theory that the main point was whether or not there had been in point of fact a payment of $500 to Jackson as the attorney of Swift, the learned judge who presided at the trial erred.

The judgment and order should be reversed, and a new trial ordered, with costs to appellant to abide the event.

SEDGWICK, J., concurred.

ANDREW J. ECCLES, RESPONDENT, *v.* ROBERT L. DARRAGH, APPELLANT.

Liability and duties of contractor engaged in taking down building.

The principle which makes a person interfering with the safety of the public highway, as such, and for private ends, an insurer of the safety of all persons traveling over the same, who may be injured in consequence of said interference, without fault on their part, cannot be extended to the case of a contractor engaged in taking down a building, there being no excavation or obstruction in the street by reason of said work; and a person injured by material falling from said building cannot recover damages upon the ground of such absolute liability on the part of said contractor.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal from judgment entered upon verdict of jury, and from order denying motion for new trial upon the minutes.

Larned, Warren & Ethridge, for respondent.

Dixon & Whitlock, for appellant.

Opinion of the Court, by FREEDMAN, J.

BY THE COURT.—FREEDMAN, J.–The plaintiff was bound to establish that the injury sustained was caused by the negligence of the defendant as a contractor, or of his servants, in taking down the building in question, exclusive of any other primary cause. The proof, showing the manner in which, and the circumstances under which, the plaintiff was struck by a piece of brick in front of the building, and that defendant's servants were at the time at work in some parts of the building, was sufficient to carry the case to the jury. But it also appeared that at the same time two other individuals were at work as sub-contractors, one in taking down the brown stone of the front wall, and the other the woodwork of the building; and there was evidence upon which the jury might have found that at that particular time defendant's men were not employed on the front, but were at work on the side and the rear of the building. Under these circumstances, and having pleaded and insisted throughout upon an absence of control over the sub-contractors, the defendant had a right to have the jury instructed, as he requested, that if the men who caused the accident were not the servants of the defendant, but were exercising an independent employment, and the defendant did not interfere with their work, he was not liable. The court refused so to charge, which was error, and as the defect was not cured by the charge as delivered, defendant's exception to such refusal must be sustained, provided, notwithstanding the existence of the sub-contracts, the defendant did not incur an absolute liability as principal contractor for a failure to erect proper guards or barricades across the sidewalk. The plaintiff contends for such absolute liability, though the jury were instructed otherwise, and cites Creed *v.* Hartman (8 *Bosw.* 123). In that case the defendant, who had contracted with the owner of lots, to build a block of houses thereon, and who had made a sub-

contract with another to make the necessary excavations, was held liable for an injury sustained by the plaintiff, who had fallen into an excavation in the sidewalk in consequence of the negligence of the sub-contractor, or his servants, in not having the same property protected. The decision of that case was sustained by the court of appeals (29 *N. Y.* 591), under the rule laid down in Congreve *v.* Smith (18 *N. Y.* 79); that, "persons who, without special authority, make or continue a covered excavation in a public street or highway, for a private purpose, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, there being no negligence by the parties injured." This principle, which makes a person interfering with the safety of the public highway, as such, and for private ends, an insurer of the safety of all persons traveling over the same, who may be injured in consequence thereof without fault on their part, cannot be extended to cover the case at bar.

The judgment and order should be reversed, and a new trial ordered, with costs to appellant to abide the event.

SEDGWICK, J., concurred.

CHARLES F. KUEHNEMUNDT, RESPONDENT, *v.* JOHN H. HAAR, ET AL., IMPLEADED, &C., APPELLANTS.

Partnership—accounting by—assignment, what passes under.—Pleading.

It seems, that an accounting may be had for the purpose of adjusting the accounts of a copartnership, *as between the partners*, though the complaint fails to show whether there are outstanding claims due to or from the firm, or whether there is property owned by the firm.

Appellant's Points.

In an action for such an accounting, where the complaint shows that an assignment for the benefit of creditors has been made by the firm, the complaint will be held insufficient on demurrer. The cause of action for such sums as may have been withdrawn in excess by any of the partners is in the firm, and passes as an asset by the assignment.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal from judgment and order overruling demurrer to complaint.

The facts appear in the opinion of the court.

Jacob A. Gross, for appellant, urged:—I. Assuming that the complaint states facts sufficient to constitute a cause of action, it also states facts which constitute a defense, consequently the whole complaint must be considered together in determining upon demurrer whether the complaint states a cause of action (Calvo *v.* Davies, 73 *N. Y.* 211).

II. If it be assumed, in the language of the complaint, "that each of said partners drew out of said firm's account large sums of money in excess of the amount drawn by plaintiff," it does not follow that the plaintiff is entitled to any relief; because,—1. By the terms of the agreement, as stated by plaintiff, defendant Haar was entitled to ten per cent. more of the gross amount of the profits than the plaintiff, and no cause of action would arise unless that sum had been exceeded. 2. The cause of action for any sum withdrawn by a partner in excess of his share of the profits was in the firm, and passed by the general assignment to their assignee as an asset, and he alone can maintain an action for its recovery (Busby *v.* Chenault, 13 *B. Monr.* 554).

III. Until the firm debts are discharged in full the plaintiff is liable *in solido* to the creditors of the firm

to the full amount of their claims, and this liability can be enforced by the assignee, who is for this purpose the trustee of the creditors.

IV. The proceedings of the assignee, as well as his powers and duties, are regulated by statute (*Laws* 1877, c. 446). The jurisdiction to compel an account, or the performance of any other duty, is exclusively vested in the court of common pleas (§§ 12–24), and until the proceedings under the assignment have been terminated, the claims of the partners arising out of the partnership are either suspended or vested absolutely in the assignee, subject to the execution of his trust.

V. The partnership was dissolved immediately upon the declaration of the insolvency (*Story on Partnership*, § 314; *Collyer on Id.* b. 4, c. 1, 583–590, 2 ed.; Griswold *v.* Waddington, 15 *Johns.* 82; Marquard *v.* Manuf. Co., 17 *Johns. Ch.* 535; *Exp.* Smith, 5 *Ves.* 295; Barker *v.* Goodair, 11 *Ves.* 78–83).

VI. Courts of equity will not interfere to settle accounts and set right any alleged balance between the partners, but will await the regular winding up of the partnership concern under the insolvency proceedings (Richardson *v.* Bank of England, 4 *Maud & Craig*, 156, 172, 173; Brown *v.* Litton, 1 *P. Will.* 224; *Story on Part.* § 229, subd. 1). The individual claim of a partner against the partnership is subordinate to, and interior to the claims of the creditors of the firm (Kirby *v.* Schoonmaker, 3 *Barb. Ch.* 46; 1 *Story Eq.* §§ 675, 676; *Exp.* Ruffin, 6 *Ves.* 119–126; *Exp.* Williams, 11 *Id.* 3, 5). The cases which hold that after the dissolution of a firm an action for an accounting may still be maintained by one partner against the other, are not in conflict with these views. Such an action can only be maintained by the party in whom the cause of action is vested. In the case before the court it affirmatively appears, by the allegation of the plaintiff, that

that cause of action has been transferred by him, and it follows that he has no more right to bring this action than a mere stranger would have.

VII. The rule of equity, that partnership property is to be first applied to the payment of partnership debts, and the individual property to the payment of individual debts, has no application in this case, because: 1. That rule exists for the benefit of the creditors, and can be invoked only by them. 2. It does not appear that there are any individual creditors as distinguished from partnership creditors. 3. Until the firm creditors are satisfied, the claim against the partners for overdrafts is, as we have seen, a firm asset.

John L. Logan, attorney, and *G. M. Bayne*, of counsel, for respondent, urged:—I. The facts stated constitute a cause of action (Luddington *v.* Taft, 10 *Barb.* 447).

II. An accounting may be had after a general assignment under the insolvent laws, to determine the equities between the partners; *non constat* that there will not be a surplus after the payment of all debts; at any rate one partner would be entitled to a personal judgment against the others for any amount which might be found due him, even if there was no surplus. This was an assignment of the partnership assets, and if one partner paid more towards the partnership debts than the other, he would be entitled to recover this amount from his copartners. In any case, the proper remedy here would be by answer setting forth that plaintiff is not the proper person to bring this action, as he has assigned his interest therein. An assignment is of itself a dissolution, and entitles either partner to an accounting. This principle is fairly deduced from the cases cited under this head (*Collyer Partn.*, 6 ed. 442; Marquand *v.* N. Y. Man. Co., 17 *Johns. Ch.*

525; Neudecker *v.* Kohlburg, 3 *Daly*, 407; Butler *v.* Ballard, 11 *J. & S.* 191; McKelvey's Appeal, 72 *Penn. St.* 409; Eden *v.* Williams, 36 *Ill.* 252).

BY THE COURT.—FREEDMAN, J.—This is an action between partners for an accounting within certain limits, and the ground of the demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The complaint sets up a partnership, its dissolution by consent, that each of the defendants during the existence of the partnership drew out large sums of money in excess of the amount drawn by the plaintiff, and that no accounting has been had, and judgment is demanded that such partnership be declared dissolved, pursuant to said consent, and an account taken of all the said partnership dealings and transactions from the commencement of the partnership, and of the moneys received and paid by the partners respectively, and that the said accounts be adjusted, *as between said partners*, and the balance due each as from the other be declared, and for such other and further relief as to the court may seem just and proper.

If this were all, the complaint might be sustained under the rule laid down in Luddington *v.* Taft (10 *Barb.* 447), though it fails to show whether or not there are outstanding accounts or demands due to or from the firm, or property owned by the firm.

But the complaint further alleges that the dissolution by consent took place in consequence of the insolvency of the firm, and that thereupon all the partners duly executed and delivered an assignment of all their partnership property and assets to one Frederick Meyer, under the insolvent laws of this State, for the benefit of their creditors, which said assignment was duly filed, and that said Meyer has duly qualified as such assignee, and entered upon the performance of his duty as such.

The complaint therefore not only states a cause of action, but also facts sufficient to constitute a defense thereto, and the whole complaint must be considered together in determining its sufficiency upon demurrer (Calvo *v.* Davies, 73 *N. Y.* 211). Upon all the facts pleaded, the court will not interfere to settle accounts within the narrow limits prayed for, but will await the regular winding up of the affairs of the partnership under the insolvency proceedings.

In Richardson *v.* Bank of England (4 *Myl. & C.* 165, 172), Lord COTTENHAM said that nothing is more settled than that, even after the determination of the partnership and before the settlement of the account, and before the payment of the joint debts, or the realization of the partnership estate, "what may have been advanced by one partner, or received by another, can only constitute items in the account. There may be losses, the particular partner's share of which may be more than sufficient to exhaust what he has advanced, or profits more than equal to what the other has received; and until the amount of such profit and loss be ascertained by the winding up of the partnership affairs, neither party has any remedy against, or liability to, the other, for payment from one to the other of what may have been advanced or received."

The cause of action for the sums alleged to have been withdrawn by the defendants in excess, was in the firm at the time of its dissolution and of the assignment, and it passed by the general assignment to the assignee as an asset. He alone can maintain an action thereon, and his proceedings as well as his powers and duties are regulated by statute.

The judgment and order appealed from should be reversed with costs, and an order entered sustaining the demurrer, with costs.

SEDGWICK, J., concurred.

Statement of the Case.

ISAAC L. EGBERT, RESPONDENT, *v.* OWEN O'CONNOR, APPELLANT.

Right of appeal—waiver of.—Order of reference.

The defendant appealed from an order referring the issues in the action for trial, and thereafter applied for leave to serve an amended answer, which was granted upon condition that the order of reference stand, and that the issues made by the amended answer be tried thereunder. Thereupon defendant duly entered an order in compliance with said conditions, served an amended answer, and proceeded with the reference. *Held*, that he thereby waived his right of appeal from the order of reference.

Before SEDGWICK and SPEIR, JJ.

Decided April 5, 1880.

Motion to dismiss appeal.

The action was brought by plaintiff on contract to recover for services, disbursements, &c., as an attorney and counselor. The answer set up a general denial and counter-claim. The reply denied the counter-claim. On plaintiff's motion, in which it appears that the trial would involve the examination of a long account, the plaintiff's bill of items, containing upwards of sixty items, and the defendant's eight items, the court at special term granted an order referring the issues to Hon. JAMES M. SMITH, to hear, try and determine, which order was entered October 25, 1879. On the same day defendant appealed to the general term from said order. On November 13, 1879, the defendant moved, at special term, for leave to serve an amended answer, and on such motion entered an order allowing defendant to serve an amended answer upon the condition, among others, "that the order of reference entered in said action at a special term of this court, on October 25, 1879, referring the same to JAMES

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M. SMITH to hear and determine, be allowed to stand, and that the issues raised by said amended answer, or by any reply thereto, be tried and determined by the said referee." On November 17, 1879, served an amended answer, to which amended answer plaintiff served a reply, November 19, 1879. Upon the issues made by the amended pleadings, the defendant has voluntarily proceeded to trial before the referee.

Isaac L. Egbert, attorney and respondent, in person.

Wilson & Hillier, for appellant.

PER CURIAM.—The motion to dismiss the appeal must be granted, with costs. The acceptance of the order appealed from, and a compliance with all of its conditions, by the defendant, is a waiver of all right of appeal.

JOHN CURRY, APPELLANT, *v.* ANDERSON FOWLER, IMPLEADED WITH WILLIAM G. McCORMACK ET AL., RESPONDENTS.

Partnership—what constitutes as to third parties.

The defendants, Fowler and McCormack, entered into an agreement by which Fowler was to lend or advance to the McCormacks $50,000, upon certain real estate, said sum to be used by them in building certain houses thereon. For this loan they were to pay Fowler interest and one-half of the profits of the houses, when sold, which it was stipulated should not be less than $12,500; the whole loan, interest, and profits to be secured by bond and mortgage on the premises, Fowler to take new second mortgages for his loan and profits, whenever the McCormacks should be ready to obtain a prior loan on the premises, such new mortgages to be paid off when the houses were sold.

Appellant's Points.

It appeared that the agreement was carried out, and all the mortgages called for by the agreement given, and that when Fowler was advised that the mortgages for $62,500 were tainted with usury, he threw off the $12,500, and took new mortgages for $50,000.

Held, that the agreement established the relation of lender and borrower between Fowler and the McCormacks, and that the share of profits to be received by the former was merely a mode of compensating him for the use of his money, and did not make him a partner, even as to third parties.*

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided May 3, 1880.

Appeal from order dismissing complaint, and from judgment entered thereon.

The action is brought for goods sold and delivered to, and for work, labor and services rendered for the firm of W. G. & J. E. McCormack, of which firm it is alleged the defendant Fowler was a partner, by virtue of an agreement annexed to the complaint.

The answer denies the partnership, and sets up special defenses.

The court dismissed the complaint on the ground that defendant Fowler was not a partner with the McCormicks.

The facts appear in the opinion of the court.

Thomas & Wilder, attorneys, and *Henry S. Sanford* and *Abner C. Thomas*, of counsel, for appellants, among other things, urged:—Such agreements have repeatedly been held to constitute partnerships (Leggett *v.* Hyde, 58 *N. Y.* 272; Ontario Bank *v.* Hennessey, 48 *Id.* 545; Manhattan Brass & Mfg. Co. *v.* Sears, 45 *Id.* 797; Fitch *v.* Hall, 16 *How. Pr.* 175; Cushman *v.* Bailey, 1 *Hill*, 526; Haas *v.* Roat, 16 *Hun*, 526). If such a contract can be made as that alleged

* See Richardson *v.* Hughitt (76 *N. Y.* 55); also Eager *v.* Crawford (*Id.* 97).

in the complaint, and if all responsibility for losses can be evaded while a half interest in profits can be secured, all of the careful provisions of our statute relating to limited partnerships can be evaded and ignored (1 *Ed. St.* 716, *et seq.*).

Martin & Smith, attorneys, and *A. P. Whitehead*, of counsel, for respondent, among other things, urged: —Such a transaction does not constitute the lender a partner (Fitch *v.* Hall, 25 *Barb.* 13; Burckle *v.* Echart, 1 *Den.* 337; aff'd 3 *Comst.* 132; Vanderburgh *v.* Hall, 20 *Wend.* 70; Lamb *v.* Grover, 47 *Barb.* 317; Turner *v.* Bissell, 14 *Pick.* 192; Denny *v.* Cabot, 6 *Metc.* 82; Loomis *v.* Marshall, 12 *Comst.* 69; Rice *v.* Austin, 17 *Mass.* 197; Gallop *v.* Newman, 7 *Pick.* 282; Heimstreet *v.* Howland, 5 *Den.* 68; Smith *v.* Wright, 5 *Sandf.* 173; Munch *v.* Gadon, 20 *N. Y.* 93; Wheatcroft *v.* Hickman, 9 *C. B. N. S.* 47, 68, 92; Lintner *v.* Milliken, 47 *Ill.* 178; Smith *v.* Vandenburgh, 40 *Id.* 34. See also note to Waugh *v.* Carver, 7 *Smith L. C.* Am. ed. 1308, and cases there cited).

BY THE COURT.—SPEIR, J.—The question to be determined is whether the defendent Fowler had such an interest in the profits of the business of the firm of W. G. & J. E. McCormack as to render him liable jointly with them as a partner to third parties. The facts in the case are uncontradicted.

The agreement in substance is that the defendant Fowler should lend or advance to W. G. & J. E. McCormack $50,000, upon certain real estate, to be used by them in building certain houses on that real estate; the McCormacks were to pay for this loan, interest, and one-half of the profits of the houses when sold, which should not be less than $12,500. The whole loan, interest and profits, to be secured by bond and

mortgage on the premises; Fowler to take new second mortgages for his loan and profits, whenever the McCormacks should be able to obtain a prior loan on the premises, and the new mortgages to be paid off when the houses were sold.

It appears that the agreement was carried out as contemplated by the parties and the mortgages called for by the agreement were all given. But the stipulated sum below which the profits should not fall, $12,500, was included with the $50,000 loaned to the McCormacks on the bond, which raised the second mortgages to $62,500. Fowler was advised that the mortgages for this latter sum were tainted with usury, and he deducted the $12,500 and took new mortgages for $50,000.

We are of the opinion that the true construction of the instrument is, that it was a contract between the lender and the borrower, in which provision was mutually made that as to the profits it was merely a mode of providing a compensation to Fowler for the use of the money he had advanced, and that Fowler was entitled to receive a share of the profits, not as a partner, but on account of the advance of the money he had made to the firm of W. G. & J. E. McCormack. The lender was to receive seven per cent. and one-half of the profits, and the money was secured by a mortgage of lands, and the money and interest were to be repaid in any event.

It is urged by the learned counsel for the appellant that as the defendant had stipulated under the agreement for one-half of the profits, besides interest, he is liable as a partner for the losses. This would be so unquestionably, had the defendant stipulated for an interest in the profits of the business, as profits, and not as a means of compensation for the loan. The money in this case was advanced by Fowler as a loan to the firm, and not as the profits of a partner. It

did not constitute a portion of the capital of the firm so as to confer the privileges or impose the liabilities incident to a partnership unless it confers some right or ownership in the partnership or the business in which it is engaged (Norman *v.* Bean, 1 *Foster*, 93; Loomis *v.* Marshall, 12 *Conn.* 69). There are no words in the agreement which authorize the parties here to act for each other, nor can any such intention be inferred from its terms. A partnership is a mutual agency and involves the existence of a joint ownership or interest which is to be managed for the common benefit. There may be a participation in profits, yet no partnership even as to third persons. The real test of the liability of a person to third parties, as a partner, is whether or not the other person or persons conducting the business were his agents to carry it on (Waugh *v.* Carver, note, *Smith N. C.* 1299, 7 Am. ed.). It is not claimed that the defendant, Fowler, became the agent of the McCormacks under the agreement or otherwise. It is true, authority may be implied where the agreement contemplates the creation of a joint ownership or interest, to be mutually managed; and if the business be so conducted, the parties thereto become liable as partners to third parties. But if the relation into which they enter is merely one of contract, and does not result in a joint interest or ownership, the partnership is not established. A loan by a banker to a manufacturer, on the terms of receiving one-third of the profits instead of interest has been said to be within the principle (Smith *v.* Vandenburgh, 40 *Ill.* 34; Lintner *v.* Milliken, 47 *Id.* 178).

The several other special defenses urged and argued at length do not require our attention.

The judgment must be affirmed, with costs.

SEDGWICK and FREEDMAN, JJ., concurred.

Appellant's Points.

SHEPHERD F. KNAPP, AS RECEIVER, &C., RESPONDENT, *v.* WALTER ROCHE, APPELLANT.

Motion to compel successful party on appeal to perfect judgment.

When judgment of affirmance is rendered by the general term, it is the duty of the respondent to prepare and file a proper judgment-roll, based upon the said decision, and the appellant has a right to insist upon the performance of that duty. This is so, though the appellant has failed to file the printed case and exceptions as settled, under rule 35, the point not having been raised at the argument of the appeal, and the proposed case, proposed amendments and settlement of the judge having been filed.

Before SPEIR and FREEDMAN, JJ.

Decided May 3, 1880.

Appeal from order denying appellant's motion to require respondent to perfect judgment pursuant to a decision made by the general term in his favor. The facts sufficiently appear in the opinion.

John T. McGowan, attorney, and *Luther R. Marsh*, of counsel, for appellant, urged:—I. The judge who tried the cause was dead, and his certificate could not be procured. The proposed case and amendments, as settled by the judge who tried the cause, were on file in the office of the clerk of this court. The case and exceptions, as settled by the judge "who tried the cause," were printed and served upon the attorneys for the respondent, and the appeal from the judgment, and the order denying the motion for a new trial, was argued at general term, upon the printed case and exceptions so served. The court and the counsel for the respondent waived the certificate, as well as the filing of the printed case.

II. The printed case and exceptions served upon the

attorneys for the respondent and submitted to the court upon the argument, are "the papers upon which the appeal was heard," referred to in section 1,354.

III. The clerk before entering judgment is entitled to insist on the payment of the fee for such service, which is chargeable to the party in whose favor judgment is entered (Burnett *v.* Westfall, 15 *How. Pr.* 430). It is the duty of the respondent to prepare and file the judgment roll on the decision of the general term. The appellant is entitled to have the successful party enter judgment upon the decision (Purdy *v.* Peters, 15 *Abb. Pr.* 160; Lentilhon *v.* Mayor, 3 *Sandf.* 723). Three printed copies of the appeal papers were served on respondent eight days before the commencement of term, under rule 41. This rule enables the adverse party to see that the case and papers on appeal are properly printed, and in case of affirmance of the judgment or order appealed from, enables him to perfect his judgment by annexing the judgment "to the papers on which the appeal was heard." The affidavit on the part of the appellant, and the certificate of the clerk, shows that no judgment roll has been filed, consequently section 1,236 has not been complied with, which requires the entry of every final judgment in the judgment book. In Schenectady Plank Road Co. *v.* Thatcher (6 *How.* 227), it was held that the decision of the court in writing, when filed, is not the entry of judgment; but that in such a case, as in all others, the judgment must be entered in the judgment book, and that until judgment is thus entered the clerk is not authorized to make up the judgment roll. The judgment roll on the affirmance of the judgment as modified, should consist of the judgment roll filed in June, 1874 (prior to the settlement of the case and amendments), the notice of appeal from the judgment and order denying the motion for a new trial, the case and exceptions as settled, the order of

the general term affirming the judgment as modified, and a *postea*. All these papers, with the exception of the order of the general term and the *postea*, are embodied in the printed case and exceptions upon which the appeal was heard, and on which the general term acted in making and rendering its decision.

Develin, Miller & Trull, attorneys, and *John E. Develin*, of counsel, for respondent, urged:—I. The judgment was perfected and the judgment roll filed on May 14, 1878, so far as the respondent was called upon to perfect and file them by the rules and practice of the court. (*a*) The order of the general term signed by the presiding judge is the judgment of the court. No costs were given, and hence no *postea* was necessary. (*b*) Where judgment of affirmance is rendered upon appeal, the judgment roll consists of a copy of the judgment, annexed to the paper on which the appeal was heard (*Code Civ. Pro.* § 1,354). "The papers" on which the appeal was heard in this action were the case on appeal as settled, which it was the duty of the defendant appellant to have filed (*Code*, § 1,353; Gen. Rule, 35), and the notice of appeal which he did file. The judgment of the general term was filed December 24, 1878, by the respondent. The only other act necessary to complete the technical judgment roll under § 1,354, was to be performed by the clerk pursuant to § 1,238. This section declares that the "judgment roll" must be prepared and furnished to the clerk by the attorney for the party, at whose instance the final judgment is entered, except that the clerk must attach thereto the necessary original papers on file; but the clerk may at his option make up the entire judgment roll. (*c*) "The judgment roll," intended by this section "to be prepared and furnished to the clerk," consists, so far as this suit and appeal are concerned, simply of the judgment of affirmance. The

Opinion by the Court.

case as settled must be filed by the appellant (Rule 35): a copy will not do. The original papers to be annexed under this section to the judgment roll ("to be prepared and furnished to the clerk") are then the case as settled and the notice of appeal. The case was in the custody and control of the appellant and the respondent could not be called upon to file it; not having, he could not file it. (*d*) The requisite papers being thus presumably in the hands of the clerk he "must," in accordance with section 1,237, immediately file the judgment-roll. The mere fact that they are not bound up in a bundle by him does not deprive them of their character of a judgment roll.

PER CURIAM.—Section 1,354 of the Code provides that when judgment of affirmance is rendered upon the appeal, the judgment roll consists of a copy of the judgment annexed to the papers upon which the appeal was heard. The papers upon which the appeal was heard and determined were the printed case and exceptions. Section 1,238 states that the judgment roll must be prepared and furnished to the clerk by the attorney for the party at whose instance the final judgment is entered; except that the clerk must attach thereto the necessary original papers on file. But the clerk may, at his option, make up the entire judgment roll.

It was therefore the duty of the respondent to prepare and file a proper judgment roll, based on the decision of the general term, by which the judgment appealed from was affirmed on certain conditions, and the appellant has a right to insist upon the performance of that duty (Lentilhon *v.* Mayor, &c., 3 *Sandf.* 721; Rust *v.* Hauselt, 69 *N. Y.* 485). The affidavit of the appellant and the certificate of the clerk show that this has not been done, so that section 1,238 has not been complied with.

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It is claimed, however, that although the case, as originally proposed by the appellant, the amendments proposed thereto by the respondent, and the settlement made by the judge who tried the cause, together with the notice of appeal, were properly filed, the motion was properly denied because the appellant failed, before the hearing of the appeal, to file a copy of the printed case and exceptions as settled. True, this should have been done, and on the argument the certificate of the clerk should have been produced, showing that it was done, and if the respondent had called the attention of the general term to the appellant's omission in that respect, the court would have enforced the rule. But the omission constituted only an irregularity, and both parties having invoked the action of the court as though all preliminaries had been fully complied with, and the court having thereupon determined the appeal on that assumption and upon the number of printed copies handed up as required by the rules, the respondent cannot now be permitted to defeat the appellant's right of review in the court of appeals by declining to perfect a judgment pursuant to the decision procured.

The order appealed from should be reversed, with costs, and an order granted requiring the respondent to enter judgment upon the decision made by the general term, and to file a judgment roll; and providing that in doing so, he may file one of the printed copies submitted on the argument and now in the hands of the clerk of the general term of this court, as the printed case and exceptions; and further providing that in case of the respondent's failure to comply with said order within twenty days, the appellant, after the expiration of said twenty days, may enter judgment and prepare the judgment roll.

Statement of the Case.

MARGARET M. BRODAR, APPELLANT, *v.* GEORGE W. T. LORD ET AL., RESPONDENTS.

Former recovery—action to recover installment on contract—when bar to action for breach.

Plaintiff having been wrongfully discharged from defendant's employment, brought action to recover certain installments of her wages, being all that she would have been entitled to under the contract at the time the action was brought. The complaint was in form for wages, but it appeared upon the face thereof that no services were rendered after plaintiff's discharge. Judgment was taken by default, and was paid in full by defendant.

Held, that the above recovery exhausted plaintiff's remedy for damages for breach of contract, and is a bar to a subsequent action therefor.*

Before SPEIR and FREEDMAN, JJ.

Decided May 3, 1880.

Appeal by plaintiff from judgment rendered at special term.

The plaintiff was hired by the defendants on March 4, 1878, for one year, at a salary of $1,300, payable in bi-weekly installments of $50 each. On September 30, 1878, the plaintiff was discharged without cause.

About October 15, 1878, plaintiff brought action No. 1 for $50 in this court, and thereafter, by leave of court, served a supplemental complaint claiming $100 more, or $150 in all. The complaints are in form for wages, but it appears upon the face of each, that no services were performed after plaintiff's discharge. No answer was interposed, and on December 10, 1878,

* See Jex *v.* Jacob, 7 *Abb. New Cas.* 452; Perry *v.* Dickerson, *Id.* 466.

plaintiff assessed her damages before the clerk, and entered judgment, which was paid in full, and a satisfaction piece was given and filed the following day.

This action was commenced on January 11, 1879, and the complaint was identical with the complaint in action No. 1, except that it sought, in form, to recover wages for four subsequent bi-weekly periods.

Defendants pleaded the former recovery, judgment and satisfaction in their answer.

Plaintiff served an amended complaint, which is in form for damages for breach of the contract, and defendants in answer again pleaded the former recovery.

The judge, at special term, found as a conclusion of law, "that the recovery in the first action exhausted the plaintiff's remedy for damages for the breach of the contract, and is a good defense to this action."

John McCrone, for appellant.

Chittenden & Hubbard, attorneys, and *James M. Townsend, Jr.*, of counsel, for respondents, urged:—I. There is but one contract involved, and but one breach, viz., that of September 30, 1878. The recovery in the first action was a recovery of damages for the breach of this contract. It appears upon the face of the complaint and supplemental complaint in the first action, that no services were performed during the periods for which recovery was sought, and, as the doctrine of "constructive service" is done away with in this State, it could not have been a recovery of salary; but in the words of his honor Chief Judge DALY, in Moody *v.* Leverich (4 *Daly*, 411), "A judgment in favor of the plaintiff could by the law have given upon no other ground. It was a recovery of damages for the breach of the contract and was a bar to any further action upon the contract."

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II. The first recovery was of damages for the breach of the contract on September 30. This second action is brought to recover damages for the same breach of the same contract. The former recovery is a bar (Colburn *v.* Woodworth, 31 *Barb.* 381; Moody *v.* Leverich, 4 *Daly*, 401; approved in Howard *v.* Daly, 61 *N. Y* 362).

PER CURIAM.—This case is governed by the case of Colburn *v.* Woodworth (31 *Barb.* 381). We are not aware that the principle decided in that case has, since the decision, been questioned, and therefore see no occasion for further examination.

The judgment should be affirmed, with costs.

ISAAC L. MILLER, RECEIVER, RESPONDENT, *v.* ELI LEVY ET AL., APPELLANTS.

Receiver in supplementary proceedings—action by, for partition of real estate—appointment of receiver therein.

The plaintiff, a receiver in proceedings supplementary to execution, to whom the judgment debtor had conveyed his interest in certain real estate devised by the will of his father to executors, in trust for specified purposes, commenced this action for partition of the premises in question, and was appointed receiver of the rents, &c., therein. It appearing that the said executors, the defendants herein, were wholly responsible; that they had duly accounted before the surrogate; that two years had elapsed since the commencement of this action and a hearing thereof had not been had; and that increased expense would be caused by such additional administration of the trust estate—the order appointing plaintiff receiver was reversed.

It seems that a receiver in proceedings supplementary to execution, to

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whom the judgment debtor has conveyed his interest in real property, cannot, as such, maintain an action for partition thereof.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided June 18, 1880.

Appeal by the defendants, executors, &c., of Abraham Levy, deceased, from an order appointing the plaintiff receiver of rents and profits of certain real estate devised by the deceased, pending an action for a partition of the same.

Charles M. Hall and *A. B. Greenhout*, for appellants, among other things, urged:—I. Plaintiff is not entitled to the control or possession of the fund in question. The executors of Abraham Levy, as trustees, are alone entitled to the rents and profits as such (1 *R. S.* 728, § 55, 729, § 60; Bradley *v.* Amidown, 10 *Paige*, 235).

II. The plaintiff, as receiver, has nevertheless not such an estate as to enable him to maintain partition (Dubois, Rec. *v.* Cassidy, 5 *W. Dig.* 210 [G. T. Sup.]; Scott *v.* Elmore, 10 *Hun*, 68; Bostwick *v.* Menck, 40 *N. Y.* 383; Chatauqua Bank *v.* Risley, 19 *Id.* 369; Becker *v.* Torrance, 31 *Id.* 641; *High on Recs.* 141, note 1; *Crabbe on Real Prop.* § 1,025; Anderson *v.* Treadwell, *Edm. Sel. Cas.* 201; *Willard Eq. Jur.* 332; *Story Eq. Jur.* § 829).

Isaac L. Miller, plaintiff and respondent, in person.

BY THE COURT.—CURTIS, Ch. J.—The plaintiff was appointed receiver of the property of the defendant, Leopold Levy, in proceedings supplementary to an execution, June, 30, 1877. The judgment debtor, Leopold Levy, by the direction of the supreme court, executed

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August 14, 1877, a conveyance to the plaintiff, of all his right, title and interest in certain real estate, which was by the will of his father, Abraham Levy, deceased, devised to his executors in trust for certain purposes, therein mentioned. Subsequently, in August, 1877, the plaintiff, as receiver, commenced the present action for a partition of the premises in question, and was thereupon, by the order of this court, appointed receiver *pendente lite*, of the rents and profits of the premises.

It is from this latter order, made January 25, 1878, appointing the plaintiff, in the partition suit instituted by him as receiver, again a receiver of the rents of the entire premises sought to be partitioned, that the defendants, executors of the will of Abraham Levy, appeal.

The papers show that the executors are responsible persons, that they are indebted to no one in any sum whatever, that they are able to answer any judgment that may be awarded in this action, and that they duly accounted before the surrogate, June 8, 1876. The affidavit of the plaintiff's attorney, made October 1, 1877, that he believes the executors will appropriate to their own uses the rents of the premises, unless a receiver is appointed, and the grounds upon which he founds his belief fail to show such necessity or pressing danger as calls for additional custodianship. The premises consist of one small lot, with a building thereon, in Avenue B; the papers disclose the payment, under the order of the surrogate, of a considerable sum by the trustees for legal expenses; the present suit may add to that amount, and in view of the absence of any actual necessity for the appointment of a receiver, and the incurring of the expenses of such additional administration of the trust-estate, there appears to be but very little ground for sustaining the order appealed from. As it is, the plaintiff has had over two

years, since this order was made, to bring his suit to a hearing, and it is apparent that the order was only made to protect the interests he claimed, while diligently prosecuting his suit, and not with the view of permanently divesting the executors and trustees of all rights and duties in the administration of the estate.

It is unnecessary, in disposing of the appeal from this order, to pass upon the question, whether the plaintiff, being a receiver in supplementary proceedings, to whom a conveyance has been made by the judgment debtor, can, as such, maintain an action for a petition. He holds the property as an officer of the court, to discharge some designated duty in respect to it, subject to its order and approval. That it should be his right, or duty, as such, to institute an action in partition, does not seem to have been contemplated by the legislature, or approved by the courts, any more than in the case of a sheriff, or a referee, appointed to sell. In Dubois *v.* Cassidy (75 *N. Y.* 302), the court say: "We are inclined to the opinion, that a receiver thus appointed does not obtain such a title to real estate as will enable him to maintain an action for partition," but they did not consider themselves, then, called upon to decide that question. In that case no conveyance was executed by the judgment debtor, as in this, to the receiver. The criticism of the court, however, upon the nature of the receiver's title to real estate of a judgment debtor, as a basis for a partition suit by the receiver in proceedings supplementary to execution, is adverse to the sustaining of the present suit.

Nor is it necessary in disposing of this appeal to determine the nature and extent of the right, title and interest of the judgment debtor, if any he had, in the estate of his deceased father, Abraham Levy.

The order appealed from, appointing the plaintiff a

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receiver of the rents and profits of the premises in question, should be reversed with costs.

SEDGWICK and FREEDMAN, JJ., concurred.

WILLIAM SCHULTZ, RESPONDENT, *v.* THIRD AVENUE R. R. CO., APPELLANT.

Liability of master for negligence of servant.—Pleading—construction of—claim for damages.

It was shown upon the trial that plaintiff was thrown from the defendant's car by the conductor in charge thereof while it was in motion. The court charged that if the conductor "acted neither maliciously nor with the view to effect some purpose of his own, but within the general scope of his employment, while engaged in defendant's business, and with a view to the furtherance of that business and the defendant's interest, believing, upon the appearance before him, and upon which he had to exercise his judgment, that his duty to defendant required him to act, then the defendant is responsible for the manner in which he acted, and for the consequences of his act, though he may have acted in excess of his authority." *Held*, correct.

The complaint stated three separate causes of action, after each of which were the words "to his damage ten thousand dollars," and closed with a prayer for judgment in the sum of $20,000. *Held*, that a verdict of $15,000 is not irreconcilable with said pleading.

A verdict for the above amount held not excessive, in view of plaintiff's injuries.

Before CURTIS, Ch. J., and SEDGWICK, J.

Decided June 18, 1880.

Appeal by the defendant, from a judgment for $15,695.16, entered upon the verdict of a jury, and also from the order, denying a motion for a new trial upon the minutes. The facts sufficiently appear in the opinion of the court.

Lauterbach & Spingarn, attorneys, and *W. A. Beach* and *H. Morrison*, of counsel, for appellant.

Stillwell & Swain, attorneys, and *B. F. Tracy*, of counsel, for respondent.

BY THE COURT.—CURTIS, Ch. J.—The complaint states three causes of action, which are separately stated, and at the end, the plaintiff asks judgment for his damages, in the premises, to the amount of $20,000. The defendant is charged with tortious acts and negligence, causing personal injury to the plaintiff. At the trial, the plaintiff introduced testimony showing that, on the afternoon of October 3, 1877, being then twelve years old, fearing he would be late in getting home, he jumped on one of the defendant's cars going down town, about the corner of Fifteenth street, having in his hands the money to pay his fare and intending to pay it; that after the car had proceeded two blocks, the conductor came from the inside of the car, and a boy, who had got upon the car, put his hand to his nose and jumped off; that thereupon the conductor, without asking plaintiff for his fare, or giving him an opportunity to pay it, and without stopping the car, threw plaintiff off from it; that plaintiff fell upon the defendant's up-track, about four feet distant, and another of the defendant's cars, coming on the up-track, the brakes being out of order, so it could not be stopped, passed partially over the plaintiff, breaking his collar-bone so that it protruded from the skin, also his second and third ribs, the right arm near the shoulder in four or five pieces, the small bone of the left arm at the wrist, the thigh joint between the middle and upper third, and causing, in addition, great contusions and abrasions, and permanently injuring him and deforming him.

On the part of the defendant, the conductor of the

car testified that he could not recognize the plaintiff, but that a boy put his hand to his nose and jumped off that afternoon, but that he did not push or kick any boy. There was testimony that the brakes of the uptown car were in good order.

The testimony of the plaintiff as to his being thrown from the car was corroborated by two witnesses.

The court, in substance, charged the jury, that they must be satisfied by the plaintiff that his injuries were the result of the defendant's negligence, exclusive of any other primary cause; that the case turned upon the question, whether the defendant had incurred any liability, by reason of the acts of the conductor of the down car; that if the plaintiff went upon the defendant's car to steal a ride, he was a trespasser, and if being such and on the approach of the conductor he jumped off, it was their duty to render a verdict for the defendant; and if they came to the conclusion the plaintiff was thrown off as described by him, before they render a verdict for the plaintiff they must be satisfied that such throwing off occurred in the course of the conductor's employment as such; that if the conductor went outside of his employment and without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly threw the plaintiff off, the defendant is not liable.

The court also charged that if the conductor "acted neither maliciously nor with the view to effect some purpose of his own, but within the general scope of his employment, while engaged in defendant's business, and with a view to the furtherance of that business and the defendant's interest, believing, upon the appearance before him and upon which he had to exercise his judgment, that his duty to the defendant required him to act, then the defendant is responsible for the manner in which he acted and the con-

sequences of his act, though he may have acted in excess of his real authority."

The exceptions to the charge, as contained in the case, are somewhat general, but the exceptions to the charge as presented on the defendants' points and discussed upon the argument of the appeal, are chiefly to the last preceding paragraph of the charge.

This portion of the charge excepted to is in conformity to the principles sustained in the court of appeals (Rounds *v.* Del. R. R. Co., 64 *N. Y.* 136; Jackson *v.* Second Av. R. R. Co., 47 *Id.* 274; Mott *v.* Consumers' Ice Co., 73 *Id.* 543).

The defendant carried passengers only for hire; and it was the right and duty of the conductor to refuse to receive a passenger who would not pay his fare, and to remove him when upon the car, if he refused to pay it; and the defendant is liable for the manner in which the conductor performs such duty if he acts under a mistake of judgment (Hoffman *v.* N. Y. Central & H. R. R. R. Co., 12 *J. & S.* 1).

The defendant claims that the verdict is irreconcilable with the pleadings; that each cause of action ends with a statement "to his damage $10,000." The controlling claim in respect to damages is at the close of the complaint, where the plaintiff prays judgment for his damages in the premises, to the amount of $20,000. This is sufficient to sustain, if otherwise tenable, the verdict of $15,000, even though the plaintiff in the three various classifications of his injuries in the complaint, uses the words "to his damage $10,000," which, in view of the prayer for judgment for his damages, are in effect surplusage.

A witness, Francis Rielly, was recalled by the defendant, and asked if he had ever conversed with one Plass, about getting him to say that his brakes were out of order, in order to fix the company with a liability. The witness testified he did not know Plass

and never conversed with any one on such a subject. The defendant, to show malice and ill-feeling on the part of Reilly, called Plass, and offered to prove that upon another and previous occasion Reilly endeavored to procure the witness, Plass, to make a full statement in regard to the condition of a car on this road, for the proposed purpose of fixing the liability upon the company, he having been discharged from its employment. This was excluded and the defendant excepted. This offer was made to contradict the testimony of the witness Reilly, who had been recalled by the defendant. It proposed to show Reilly had asked him to tell a lie about his brakes, to injure the company. The issue presented was foreign to the issues before the jury. Viewing the case as a whole, there is no reason for believing that this exclusion was injurious to the defendant, or that the court erred in the exercise of a proper discretion, or in law, by excluding the offer of the defendant, to contradict the witness it recalled and examined.

The number and severity of the plaintiff's injuries, the pain, deformity and inability consequent upon them, as shown by the medical testimony, were of such a character that the verdict, though large in amount, should not be set aside on the ground that it is excessive.

The judgment and order appealed from should be affirmed, with costs.

SEDGWICK, J., concurred.

Appellant's Points.

ISAAC STEINBERG, AN INFANT, &c., *v.* THE MANHATTAN RAILWAY Co.

Guardian ad litem.— Security for costs.

A guardian *ad litem* is responsible for costs under the Code of Civil Procedure, but he is not required to file security therefor.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided June 18, 1880.

Appeal from an order denying a motion to compel the guardian *ad litem* to the infant plaintiff, duly appointed under the Code of Civil Procedure, to file security for costs.

It was not claimed that the guardian is irresponsible or a non-resident.

R. E. Deyo, for appellant, urged:—In the case of Blake *v.* Doolan, decided in the supreme court by Judge DANIELS, in December last, the following opinion was delivered: "The circumstances that the guardian for an infant plaintiff is required to be a competent and responsible person, who shall be responsible for costs (*Code*, § 469), is not sufficient to deprive the defendant of the right to security. The same qualifications were required for the person selected as the next friend of an infant plaintiff before the enactment of the Code, and the person appointed was in like manner rendered liable for costs (2 *R. S.* Edm. ed. 465, § 2). The only change made by the Code in the section is in the name given to the person appointed, and that was not sufficient to supersede the provision entitling the defendant to require security to be refiled. As both requirements existed together under the Revised Statutes, they must be both equally consistent with each other under the Code. The statute entitles the defendant to the security (5 *R. S.* 5 ed. 910, § 1). And

neither the section of the Code referred to, nor either of those following, *i. e.*, providing for a bond to the infant, is, in the least degree, in conflict with the continued existence and authority of that provision. The order must require a bond as security for the defendants' costs. There are decisions to the contrary, viz.: Leinner *v.* Crouse, 61 *Barb.* 289; Grantman *v.* Thrall, 29 *How. Pr.* 344. But it is respectfully submitted that the opinion of Judge DANIELS, and the dissenting opinion in Grantman *v.* Thrall, are the only ones which reconcile the Code with the Revised Statutes, and that such reconciliation must be made, if possible.

Frank Etheridge, for respondent, urged:—I. No security can be required. The provisions of the Revised Statutes as to security being filed by the "next friend" of an infant plaintiff, do not apply to a guardian *ad litem* appointed under the Code (Linner *v.* Crouse, 61 *Barb.* 289; Grantman *v.* Theall, 19 *Abb. Pr.* 308).

II. The Code of Civil Procedure makes the guardian *ad litem* liable for costs (§ 469).

III. The order was discretionary, and is not appealable (Bolles *v.* Duff, 17 *Abb. Pr.* 448; Fearn *v.* Gelpcke, 13 *Abb. Pr.* 473).

BY THE COURT.—CURTIS, Ch. J.—The defendant appeals from an order, denying his application that the guardian *ad litem* of the plaintiff file security for costs. The Code of Civil Procedure makes the guardian *ad litem* responsible for costs (§ 469), but it does not require him to file security therefor. If the legislature had intended that an infant plaintiff should be restrained from prosecuting an action until his guardian *ad litem* filed security for costs, which, in the present application it is claimed should be for $750, it is but reasonable to suppose they would have made some enactment to that effect.

Opinion of the Court, by SEDGWICK, J.

The order appealed from should be affirmed, with costs.

FREEDMAN, J., concurred.

RUTH A. GANE, RESPONDENT, *v.* GEORGE A. GANE, APPELLANT.

*Alimony—payment, how enforced.**

Where the final decree in an action for divorce directs the payment of a certain sum as alimony, but makes no provision in regard to security therefor, an order directing the defendant to pay the alimony, and further providing "that he give security for the future payment of said $600, and in default thereof that an attachment issue punishing defendant as for contempt," is not proper and should be reversed. Park *v.* Park (9 *Week. Dig.* 391), distinguished.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided June 18, 1880.

Motion for re-argument by respondent. The facts appear in the opinion.

T. J. McKee, for appellant.

R. W. Todd, for respondent.

BY THE COURT.—SEDGWICK, J.—A judgment having been made that defendant pay certain sums as alimony, and the defendant not having paid them, proceedings were taken to enforce the judgment by declaring him in contempt for this non-payment. An order was made directing him to pay the alimony,

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* See Gane *v.* Gane, 45 *Super. Ct.* 355.

"and that he give security for the future payment of said $600, and in default thereof, that an attachment issue, punishing said defendant as for a contempt of court." On appeal, this order was reversed and the respondent makes this motion for a re-argument, on the ground that since the decision the court of appeals has held in Park *v.* Park (9 *Week. Dig.* 391), that a judgment for the payment of alimony can be enforced by proceedings for contempt. The manuscript of the opinion of Judge MILLER, in Park *v.* Park, has been handed up.

The case of Park *v.* Park is not at variance with the decision in this case. This court held that the judgment for the payment of alimony could be enforced by execution, and therefore the court had not power to enforce it by proceedings for contempt. In Park *v.* Park, the judgment directed that the defendant "pay and give security for the payment of the allowance granted to the plaintiff." The court of appeals held that the court had power to enforce this by attachment and imprisonment, under the last clause of the 3d subdivision of the 14th section of the Code of Civil Procedure. That section gave the court power to punish by fine and imprisonment in the case of "a party to the action . . . . for the non-payment of a sum of money ordered or adjudged by the court to be paid, in case where, by law, execution cannot be awarded for the collection of such sum or for any other disobedience to a lawful mandate of the court." Judge MILLER said, "The proceeding is for disobedience of an order of the court, to compel the defendant to furnish the security required by the decree, and the final order of the special term provides for this as to future alimony. The provision that execution may issue does not interfere with the order that security be furnished." The sum of the opinion is that, in case of judgment for payment of alimony, and that security be given,

although execution may be issued for the collection of the alimony, and therefore a party cannot be attached or committed for non-payment; yet, as the giving security cannot be enforced by execution, it may be enforced by proceedings for contempt.

In this case, the order, made after final judgment, and which ordered "that he give security for the future payment of said $600," was not a part of the judgment or a modification of it. It did not purport to be either, nor did any part of the proceeding disclose an intention on plaintiff's part to move for a modification of the judgment. If the result had been an order which, on its face, modified the final judgment, this court would have been called upon to decide whether a final judgment could be modified by the proceeding that was taken. The proceeding, unless viewed as a means of enforcing the judgment, was an independent one, to compel payment of alimony, and the court had no power to entertain it.

The opinion of the supreme court in Park *v.* Park (25 *Sup'm. Ct.* 469) sustained the proceedings on the ground that the defendant had not complied with the direction of the judgment, that security be given; and, while it questioned, did not reverse, but assumed the correctness of the decision of Lansing *v.* Lansing (4 *Lans.* 377).

Motion for re-argument denied, with $10 costs and the disbursements.

CURTIS, Ch. J., and FREEDMAN, J., concurred.

PHEBE HENDERSON, RESPONDENT, *v.* JOHN Y. SAVAGE, APPELLANT.

Inquest—motion to open—when denied.

An application to open an inquest and serve a supplemental answer setting up a discharge in bankruptcy, will not be granted when it appears that the discharge was obtained pending the action, and that defendant made no motion to amend his answer (though the inquest was not taken till a year after the discharge), and that no motion to open the inquest was made till several years after judgment, no excuse for defendant's laches appearing.

Before CURTIS, Ch. J., and SEDGWICK, J.

Decided June 18, 1880.

Appeal from order denying motion to open inquest and for leave to serve a supplemental answer setting up discharge in bankruptcy.

The facts sufficiently appear in the opinion.

Nelson J. Waterbury, for appellant.

James Henderson, for respondent.

BY THE COURT:—SEDGWICK, J.—If the learned court below was correct, in denying the motion, on the ground that there had been laches in making the application to set up the discharge in bankruptcy, the appellant showed no right to have the inquest opened, for it was practically admitted, or, at least, the papers disclosed that on the merits the appellants could rely only on the discharge. Under the circumstances, whether the appellant should have leave to make the defense was within the discretion of the court.

This discretion was not regulated alone by the

character of the immediate issue. Its exercise depended also upon considerations of general rules, involving public policy. One of these is that unreasonable and unexplained delay in making an application, requires a denial of the application. In the present case it cannot be held that the facts show that the court exercised its discretion improperly.

The action was begun in September, 1869. In March, 1871, the defendant obtained his discharge in bankruptcy. In 1872, the inquest was taken, and in June of that year judgment was entered. It appeared in evidence that the defendant knew that execution had been issued. The papers show that he was aware of the necessity of setting up the discharge by answer, in order to benefit by it, in this action. No application to set up the discharge was made until 1879, and after an order of examination in supplementary proceedings had been served. There are no facts alleged which appear to have required the court to hold that this delay was excused.

The order should be affirmed, with $10 costs.

CURTIS, Ch. J., concurred.

GEORGE MALCOLM, RESPONDENT, *v.* HUGH O'REILLY ET AL., APPELLANTS.

Conversion.—Pleading.—Chattel mortgage.

Where, by the complaint in an action against the sheriff, for wrongfully taking and converting certain chattels, it appears that plaintiff claimed title to the property as mortgagee under a chattel mortgage, in the form of a bill of sale, with condition that on payment of a certain sum on demand it should be void, mortgagor to remain in possession until default, &c.; an allegation that the plaintiff was

Opinion of the Court, by SEDGWICK, J.

the owner of the chattels in question is sufficient to sustain the action, without any averment of default on the part of the mortgagor.

Before CURTIS, Ch. J., and SEDGWICK, J.

Decided June 18, 1880.

Appeal from a final judgment entered on an order overruling a demurrer to plaintiff's complaint.

The action was brought by plaintiff to recover, of the sheriff of New York county, damages for the conversion of property which plaintiff owned at the time of the conversion. Before the time to answer the complaint had expired, the sheriff's indemnitors, under and in pursuance of sections 1,421 to 1,426 of the Code, were substituted as defendants in the place of the sheriff. The substituted defendants demurred to the complaint as served upon the sheriff, on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled.

William P. Mullery, for appellants.

J. F. Bullwinkle, for respondent.

BY THE COURT.—SEDGWICK, J.—The complaint stated that one Whelan executed and delivered, for consideration, to the plaintiff, a mortgage upon certain chattels of Whelan. By the mortgage annexed to the complaint, it appeared to be in the usual form of a bill of sale, upon condition that on payment of a certain sum on demand it should be void. The mortgagor covenanted that in case of default in payment of the money, the plaintiff might take possession of the chattels and sell the same, with the further covenant, that until default be made in the payment of the money the mortgagor was to remain and continue in the quiet and peaceable possession of the chattels.

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The complaint further averred that payment of the money was demanded by the plaintiff of the mortgagor, "and thereupon, pursuant to said mortgage, the plaintiff was entitled to the immediate possession and control of the property so mortgaged, and became the owner thereof, and thereupon took the same into his possession, and, while the plaintiff was lawfully possessed," &c., the defendant wrongfully "took and converted the same to his own use."

The defendants sustained their demurrer by the proposition that the terms of the mortgage provided that the mortgagor should remain in possession, until default of payment, after demand, and although the complaint stated a demand, it did not state that there had been any omission or refusal to pay.

Since the pleader seemed to have brought his action on the case, it would have been better to have alleged the default specifically, but I am of opinion that the complaint, without it, should have been, as it was, sustained. The complaint stated that the plaintiff was the owner of the property. It was unnecessary to state in what manner he became owner, because, as to the ultimate fact of ownership, the manner was matter of evidence. It did not contradict that averment to allege that it was pursuant to the mortgage—for in effect that was a bill of sale to the plaintiff—nor to allege that a demand was made. If it were an essential part of the title, that there had been a default, the omission to plead it did not create a presumption that it had not occurred when the fact of ownership was alleged.

Judgment should be affirmed, with costs.

CURTIS, Ch. J., concurred.

Appellant's Points.

SAMUEL P. KNAPP, APPELLANT, *v.* ULRICH SIMON, IMPLEADED, &C., RESPONDENT.

Agent—liability for failure to disclose principal—rights against principal.—Statute of limitations.

A broker employed by his principals to purchase for them, as such broker, from a specified person, a certain commodity, with no authority to purchase in his own name, and who, by reason of his failure to disclose his principals, is personally charged with and pays a judgment for the purchase-price thereof, has no rights against his principals, arising out of said transaction, except those gained upon principles of equity, giving him such claim as the vendor may have against said principals.

Consequently, a release of all claims arising out of said sale, given by the vendor to one of said principals (Act of 1838, for relief of partners and joint debtors), prior to the commencement of the vendor's action against said broker, furnishes to the party so released a good defense to a subsequent action brought by the broker against his principals, to recover the amount paid by him as above stated.

Such action by the broker against his principals, should be brought within six years from the time the vendor's claim accrued.—SPEIR, J.

Before SEDGWICK and SPEIR, JJ.

Decided June 18, 1880.

Appeal by plaintiff from judgment entered on verdict directed by the court.

The facts appear in the opinion.

D. M. Porter, for appellant, urged:—The plaintiff and defendants (because of the plaintiff's failure to disclose to Cobb who were his principals) were both liable to Cobb (Mason *v.* Cockcroft, 3 *Duer*, 366; Coleman *v.* Bank of Elmira, 53 *N. Y.* 394; Cobb *v.* Knapp, 71 *Id.* 348; *Story on Agency*, §§ 266, 267; Meeker *v.* Claghorn, 44 *N. Y.* 349). The superior court, in Cobb *v.* Knapp (10 *J. & S.* 99) held that payment of the $1,717.82 was properly credited,

but that it did not affect Knapp's liability. There is no proof that the plaintiff Knapp had any information of any alleged release, neither is it material whether he had or had not, because defendant Simon's payment and paper only affected it to the extent of his liability, as Knapp was surety for the three members of the firm of C. A. Steen & Co. It cannot be disputed but that the recovery by Cobb against Knapp was against him upon a liability as principal; but the relation between the defendants in this action and Knapp, the plaintiff, was that the defendants were the principal debtors and Knapp was their surety, although a principal to Cobb. Again, the release expressly provides that it shall not release Donau and Steen, the other defendants herein; and the statute under which the release was given (3 *R. S.* 5 ed. p. 66, § 28) provides that the other joint debtors shall not set up the discharge of one individual as a discharge of the others, unless it shall appear that all were intended to be discharged. Section 29 reads: "Such compromise or composition of an individual of a firm with a creditor of such firm shall in nowise affect the right of the other copartners to call on the individual making such compromise, for his ratable portion of such copartnership debt, the same as if this law had not been passed." Consequently, inasmuch as Knapp, the plaintiff herein, has paid the debt owing by the other copartners, and was surety to the three, the release of the defendant Simon would be no bar under the statute, and, as to the plaintiff, is an act between third persons, and the plaintiff's cause of action arose against the defendant Simon after the release was given (President, &c., of Mech. & Farm. Bk. *v.* Capron, 15 *Johns.* 467, note A). It must be here borne in mind, as has been said, that as between Cobb and the defendants, they were principal debtors to Cobb, and Knapp was also principal debtor to Cobb. The stipulation was no

more obligatory than those in the case of Hubbel *v.* Carpenter (1 *Seld.* 171), in which case the court says: "In such case the principal debtor, though no longer liable directly to the creditor, remains liable to refund to the surety the amount of the demand, in case it should be afterwards collected from him." "The surety will not be discharged by a release if the contract reserves all the rights of the creditor against the surety, for, in that case, the surety may pay immediately, and forthwith proceed against the principal, even though the creditor accept a composition" (Wagman *v.* Hoag, 14 *Barb.* 232). Under facts substantially similar to the facts in this case, the plaintiff was held entitled to recover back from the defendant the amount in an action for money paid, in Kearsley *v.* Cole (16 *Mees. & Wels.* 127). Judgment either ought to have been directed for the plaintiff or there was a conflict of testimony, and it was error in the court to refuse to submit the question to the jury as it did (Stone *v.* Flower, 47 *N. Y.* 566).

Vanderpoel, Green & Cuming, attorneys, and *H. W. Bookstaver* and *A. J. Vanderpoel*, of counsel, for respondent, urged:—I. The cause of action was barred by the statute of limitations. Section 380 of the Code provides: "The following actions must be commenced within the following periods after the cause of action has accrued." "§ 382. Within six years: 1. An action upon a contract, obligation or liability, express or implied, except a judgment or sealed instrument." There can be no doubt but that the cause of action relied on in this case falls within this provision. Plaintiff's right to recover in this action does not depend on the recovery of judgment in Cobb against Knapp, but upon the terms and conditions of the purchase and sale of the wheat made by Knapp on October 23, 1868. No new terms were made after that time.

Cobb recovered of Knapp because, in making the purchase of him, he failed to state the fact that he was acting as a broker merely, and chose to deal with Cobb as principal. His position as principal was fixed by the agreement of October 23, 1868. This action was not commenced until April 1, 1878, nearly ten years after the cause of action accrued.

II. The release executed by Cobb to Simon was an absolute bar to any recovery by the plaintiff in this action against Simon. Chapter 257, *Laws of* 1838, section 1, provides: "Whenever any copartnership firm shall be dissolved by mutual consent or otherwise, it shall and may be lawful for any one or more of the individuals who was or were embraced in such copartnership firm, to make a separate composition or compromise with any one or all of the creditors of such copartnership firm, and such composition or compromise shall be a full and effectual discharge to the debtor or debtors making the same, and to them only, of and from all and every liability to the creditor or creditors with whom the same is made or incurred, by reason of his or their connection with such copartnership firm." The firm of C. A. Steen & Co. was dissolved in October, 1868. The release was executed October 30, 1869, a year after the dissolution. Simon paid for it his full ratable portion of the copartnership debt and interest. Even his partners, had they been compelled to pay the remainder, could not have called on him for more (*L.* 1838, c. 257, § 4). Cobb's action against the plaintiff was not commenced before October 28, 1873. Had the plaintiff notified Simon of the pendency of Cobb's action against him, or called on him to defend it, he would have had a perfect defense as far as he was concerned, and there could have been no recovery for his portion of the debt. But Simon was not notified of that action, nor called on to defend it. The plaintiff was guilty of negligence in defending

that action as he did, and in not calling on his alleged principals to defend it, and must bear the consequences; he cannot charge them to the defendant Simon. In Barmon *v.* Leithaur (1 *Abb. Ct. App. Dec.* 99), the court says: "They (the defendants) cannot be held responsible for a judgment procured against the plaintiff by default, or his negligence, without their knowledge or consent. The fact that such a judgment was obtained would not of itself render the defendants liable if they were previously exonerated. In order to make them responsible, the defendants should have been notified of the commencement of the action, and have been permitted to defend it, had they chosen to do so." In this case, one of the defendants had testified as a witness for the defendant in the original action, the plaintiff in the action in which the court pronounces the opinion above quoted.

BY THE COURT.—SPEIR, J.—The action is brought by the plaintiff to recover, of the defendants, the value of certain wheat alleged to have been purchased of one Carlos Cobb for defendants, by plaintiff, as their broker, and for which Cobb had recovered certain judgments against plaintiff, and the costs of defending the action, on the alleged ground that he had failed to disclose to Cobb the defendants as his principals. The judgments were recovered against the plaintiff, although the defendants in this action were the principals in the transaction, and the plaintiff a mere broker and surety, under allegations and proof that plaintiff failed to disclose his principals.

The answer sets up a number of defenses, among them a release executed by Cobb for a valuable consideration to the defendant Simon, whereby he was released from all demands arising out of the transaction set forth in the complaint. It also sets up the

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statute of limitations. The other defendants were not served, and are not in the action.

The case presents only questions of law to be determined by the court. At the close of the case, there were no questions of fact to be considered by the jury. The non-payment of the price of the wheat was admitted by the defendant. Cobb recovered of Knapp because, in purchasing the wheat of him, he failed to state the fact that he was acting as a broker merely, and dealt with Cobb as principal. The plaintiff's right to recover here does not depend upon the recovery of judgment in Cobb against Knapp. It depends upon the terms and conditions of the purchase and sale of the wheat made by Knapp, the plaintiff, on October 23, 1868. This action was commenced on April 1, 1878, about ten years after the cause of action accrued. The case clearly comes within the statute. Besides, we are of the opinion that the release executed by Cobb to Simon was an absolute bar to any recovery by the plaintiff in this action against Simon.

Carlos Cobb had a suit pending against the defendants, C. A. Steen & Co., for this same wheat. The plaintiff, wishing to settle this suit, went with the defendant Simon to Cobb's office, where it was settled, and a release, under the act of 1838, for the relief of partners and joint debtors, was executed and delivered by Cobb to Simon, upon his paying thirty-three and one-third cents on the dollar, of Cobb's claim. The firm of C. A. Steen & Co. was dissolved in October, 1868. The release was executed a year after the dissolution, and for it Simon paid his full ratable portion of the partnership debt, and interest. The other defendants of the firm, who are not in this suit, do not appear to be in any way connected with the plaintiff's liability to Cobb, which entitles them to any consideration in determining the rights of the parties in this action. The liability was personal to the plaintiff; the settle-

ment of Cobb's suit against C. A. Steen & Co. was procured at the instance of the plaintiff, and the release then executed to the defendant Simon is a bar to this action.

The judgment should be affirmed, with costs.

SEDGWICK, J.—[Concurring.]—I am of opinion that the plaintiff could not maintain any action against the defendant after his release by Cobb, and that at no time could he obtain any other relief, in kind or quantity, than Cobb could have properly obtained. The reason of this is a position, fundamental to all contracts. The duties of the parties to this action were such as arose from their voluntary agreement. The defendant's firm had employed the plaintiff as their broker, to buy of Cobb. This authorized the plaintiff to do that thing, and if he had done it, he would not have incurred any liability to Cobb. If he be at liberty to insist now, that the judgment in Cobb against him is not *res adjudicata*, as to the facts of his sale to Cobb, and that he did sell, disclosing his principal, then the legal consequence of such a fact must have full effect, and it must be held that he paid the purchase-price to Cobb, without being legally liable to pay it. On the other hand, if he did not disclose his principal, this omission was not at the request, express or implied, of the defendant. The pleading does not allege that there was any request; there is no evidence that there was. The plaintiff incurred the liability voluntarily, without defendant's requesting it, and therefore without his being responsible for its consequences. The defendant's liability must be confined to such consequences as would follow the exercise of the authority given by him to the plaintiff. If the authority had been followed, the defendants would have become liable to Cobb, with no liability to plaintiff,

excepting for brokerage and expenses. This liability to Cobb would have had, as an incident, the possibility of the single defendant, now here, being discharged from it, under the joint debtors act. It cannot possibly be held, in my judgment, that a departure from the instructions can deprive the defendant of such an advantage, and which existed in this case.

It would seem to be involved in these views that the defendants were not connected at all with the plaintiff's liability to Cobb, and therefore they were not liable to plaintiff, as if he were their surety. If the plaintiff upon paying Cobb, in discharging the liability, gained any right against the defendants, it would be gained upon principles of equity, that would give to him, under the circumstances, such claim as Cobb might have against the defendants, and in this case Cobb had none against the defendant in this appeal. Nor would the plaintiff become possessed of the other defendant's right to contribution against this defendant. This is true, for the further reason that the other defendants cannot claim a contribution to themselves for what they have not paid. Probably, under no circumstances, could they claim anything, in excess of what the present defendant has paid Cobb.

I therefore agree that the judgment should be affirmed, with costs.

WILLIAM H. DICKINSON, RESPONDENT, *v.* JOHN DEVLIN, APPELLANT.

I. Contingent compensation measured by a proportionate part of the fruits resulting from the services to be compensated for.

1. PERSONAL LIABILITY OF EMPLOYER, WHEN.

1. When he actually receives the fruits.
2. When one (*other than the employer*), acting under a power of

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attorney from the employer, given with the consent of the employee, actually receives such fruits.

(*a*) This, although *such person retains* in his hands the proportionate part of the fruits which was payable to the employee for his compensation, and does not pay it over to the employer or employee.

2. ACTION TO ENFORCE PERSONAL LIABILITY.

1. COMPLAINT IN.

(*a*) A complaint, which sets out the original agreement for compensation, the performance of service under it, and that the fruits resulting from the services had been received by one whom the defendant, with the knowledge and consent of the plaintiff, has authorized to receive the same, and that neither such person nor defendant has paid to plaintiff the proportionate part of such fruits payable to him,

States a good cause of action.

Upon such a state of facts, the defendant had the power and was bound to see that the person who received the money paid to the plaintiff his proportion thereof, or to demand it from such person and pay it himself.

1. SURPLUSAGE.

(*a*) Further allegations as to the disposition made by such person of the fund received by him, as to a demand made on him by the plaintiff for a part of the fund, and a refusal by him to pay on the ground of a direction given to him by defendant not to pay, as to a notification given to such person by defendant not to pay, and as to defendant's claiming the whole fund, and denying the right of the plaintiff to any portion thereof, may all *be treated as surplusage.*

1. EFFECT OF SO TREATING THEM.

1. Under a general denial plaintiff is not put to proof of them.

2. Under a general denial, an affirmative defense cannot be interposed.

3. AFFIRMATIVE DEFENSES.

1. ACCORD AND SATISFACTION, agreement in nature of.

(*a*) E. G. An agreement between employer and employee, that the employee's personal liability should be discharged by the transfer by the employer to the employee of the employer's right to the fund in the third person's

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hands, to the extent of the employee's proportionate part thereof, is an affirmative defense, and must be pleaded.

2. PAYMENT BY SUCH THIRD PERSON to the employee is an affirmative defense, and must be pleaded.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided June 18, 1880.

The complaint alleged, in substance, that defendant employed plaintiff, an attorney-at-law, to sue for and collect a certain claim held by him against the United States government, upon a contingent fee of one-half of all sums thereafter recovered for, or paid back to, him, the defendant, his representatives or assigns, on account of the claim referred; that under this agreement plaintiff rendered services and expended money, and through attorneys employed by him caused a suit to be brought in the court of claims, in which judgment was recovered against the United States for $10,000; that subsequently to the recovery of said judgment, and on December 31, 1877, the defendant authorized Charles D. Gilmore, in writing, as required by the regulations of the United States Treasury Department to collect the amount of the judgment from the United States, and pursuant to such authority the said sum of $10,000 was paid to said Gilmore on said day, in satisfaction of said judgment.

The complaint then proceeded as follows:

"That on said December 31, 1877, said Gilmore paid the defendant, John Devlin, $5,000 out of said $10,000 collected, and retained in his possession $5,000; that plaintiff has demanded of said Gilmore $2,500 of said $5,000 so retained by him, but said Gilmore refused to pay the same or any part thereof, alleging, as a reason, that said Devlin has notified and directed him not to pay any portion of said $5,000 so retained

by him to this plaintiff; and plaintiff alleges and charges that defendant has so notified said Gilmore not to pay this plaintiff any portion of said money, and that said Devlin claims the whole of said $5,000 so retained by said Gilmore, and denies the right of plaintiff to any portion thereof; that defendant is indebted to the plaintiff, upon this account, in the sum of $2,500 and interest, since December 31, 1877."

The answer was a general denial.

The issues came on for trial before the court and jury, and the trial resulted in á verdict for the plaintiff for the full amount claimed, given under the direction of the court.

From the judgment entered on the verdict, defendant appealed.

The facts sufficiently appear in the opinion.

A. H. Dailey, attorney, and of counsel, for appellant.

Wm. H. Dickinson, attorney, in person, and *S. Jones*, of counsel, for respondent.

BY THE COURT.—SEDGWICK, J.—In this case the learned judge directed a verdict for plaintiff. It cannot be doubted that the testimony, given by the defendant himself, showed without dispute that the plaintiff was entitled to receive for his services, alleged in the complaint, $2,500, the amount he claimed. The only question on the facts was whether plaintiff's claim was a personal indebtedness of the defendant or whether it was a claim to a fund held by one Gilmore. If it were the former, there was the further question whether the complaint alleged it, as the cause of action.

The facts were as follows: the defendant had employed, in a form not necessary to describe, the plaintiff, to collect a claim against the United States, and agreed, in consideration of plaintiff's services, to give

him "one-half of all sums which may be recovered for or paid to me, my representatives or assigns, on account of the claim referred to." The plaintiff then employed certain attorneys in Washington to prosecute the claim before the court of claims. The prosecution was successful, and ended in a warrant being drawn in the treasury department for $10,000, to the order of the defendant. The warrant could not be obtained without special authority from defendant, and for this purpose the defendant, with the knowledge, and consent of the plaintiff, gave a firm, a member of which was one of the attorneys employed by plaintiff, a power of attorney to receive and indorse the warrant and to receive its amount. It would appear at this point, that the plaintiff, having agreed that his attorneys should equally share with him his one half of the recovery, there was an agreement made in reference to the distribution of the proceeds of the warrant. The defendant testifies: "Dickinson authorized me to give Gilmore a power of attorney, on condition that I would sign an agreement to give said Dickinson $2,500. The power and the agreement were executed; Gilmore went to the treasury department and came back with the money; I received as per agreement $5,000, $2,500 was for Dickinson and $2,500 for Gilmore." On this statement it is clear to me that the plaintiff's right to payment had become perfect and that the defendant received the money, when Gilmore, his personal representative, collected the warrant, and that it was a personal obligation by the defendant to pay the plaintiff. His legal relation to Gilmore was such that he had the power and was bound to see that Gilmore paid to the plaintiff, or to demand the money from Gilmore and pay it himself. Of course it is perceived that the facts suggest that one way of discharging the personal obligation would be to make a competent agreement that such obligation should be discharged by a transfer

to the plaintiff of his right to the fund in the hands of Gilmore, to the extent of $2,500. Such a discharge would be in the nature of an accord and satisfaction. But the facts do not show such an accord.

The first agreement and the second agreement were that the defendant would pay and would give. It may be true that their agreement was such, that the plaintiff, if he chose and was able, had the right to require that the amount due to him should be reserved out of the recovery, before payment to the defendant, but his right was not gone if he allowed the defendant to receive the recovery. He could then assert the personal obligation to pay. If the facts showed such an accord and satisfaction, or, as the defendant's counsel claimed, a payment actually by Gilmore to plaintiff, it was an affirmative defense, which must be pleaded to avail. The answer was, however, a general denial.

It stands in this way, then, that there was an agreement that the defendant should pay to plaintiff one-half of any recovery by defendant, and the defendant did recover and receive $10,000. The defendant, before the receipt by him of this amount, by his attorney, Gilmore, recognized and acted upon a subordinate agreement that the plaintiff had made with the attorneys employed by him, and consented that they should be paid out of the amount to be collected by Gilmore, $2,500, and promised to give the plaintiff out of the same proceeds $2,500. This promise he has failed to keep, and there is no proof that the plaintiff ever agreed to look to Gilmore for the $2,500. The same state of facts shows that the first promise to pay one-half of the proceeds has been broken.

As to whether this cause of action was stated by the complaint, there would have been no doubt if the plaintiff had contented himself with pleading the first agreement, and not obscuring the matter with a further indefinite set of allegations that, fortunately for him,

did not set up a defense for the defendant, but was calculated to suggest that the first contract had been merged in a subsequent agreement. On the whole, the matters subsequently stated as to the manner in which Gilmore disposed of the money received upon the warrant should be rejected as surplusage.

The views above expressed cover the ground to which the exceptions in the case extend, and there is no necessity of detailing those exceptions.

The judgment should be affirmed, with costs.

CURTIS, Ch. J., and FREEDMAN, J., concurred.

WILLIAM B. CANFIELD, ET AL, RESPONDENTS, *v.* THE BALTIMORE & OHIO R. R. CO., APPELLANT.

Judge's charge—error in, when not cured by subsequent charge.—Common carrier.—Burden of proof.

Where the court erroneously charges the jury, as matter of law, that a certain material fact is as contended by plaintiff, such error is not cured by a subsequent charge, made upon request of defendant's counsel, to the effect that the burden of proof is on plaintiff to show the said fact to be as claimed by him, and that on the evidence in the case it is a question for the jury whether it is so or not, and if they believe such to be the fact, they will find, &c.,—the original charge in that regard not having been withdrawn.

In an action against a common carrier for loss of goods, alleged to have occurred by the negligence of the carrier, the burden of proof as to the delivery of the goods is on the plaintiff.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided June 18, 1880.

Appeal from a judgment entered on a verdict in

favor of the plaintiffs, and from an order denying defendant's motion for a new trial.

The facts appear in the opinion.

Hutchins & Platt, attorneys, and *Austin G. Fox* and *Waldo Hutchins*, of counsel, for appellant, among other things, urged:—The misdirection in regard to the presumption of law as to the delivery of the goods requires a reversal of the judgment. I. An erroneous instruction in regard to a presumption of law is cause for a new trial (*Hilliard on New Trials* [2 ed.], 306, § 62; 1 *Best on Evid.* [Wood's Am. ed.] § 304; Hollister *v.* Johnson, 4 *Id.* 639; Glover *v.* Duhle, 19 *Mo.* 360; Holliday *v.* Atkinson, 5 *B. & C.* 501; Graves *v.* Colwell, 90 *Ill.* 612, 618).

II. The error in the misinstruction was not cured by any subsequent instruction. 1. The court did not withdraw or modify the misinstruction. It laid down the erroneous rule in explicit terms, adding that, "the case being considered a very close one, the court had some hesitation in coming to that conclusion." The next sentence is "They have, however, said that the evidence justified the finding that they were delivered to the defendants." Here is no qualification or withdrawal of the erroneous rule which the court of appeals was represented as laying down with hesitation. The jury were instructed that the court came to the conclusion, and whether with hesitation or not, is of no importance. But the next sentence shows how the court understood its instructions: "The defendants took the goods into their possession." Again, the court left it to the jury to determine whether the goods were "stolen while in the possession of the defendants, the Baltimore & Ohio Railroad Company, or while in the store No. 15 Maiden Lane," excluding an inquiry into the question whether the goods were stolen while in the possession of the plaintiffs' carman on the way from

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De Wolff's store to the defendant's station. 2. The error was not cured by the charge of the eighth proposition submitted by the defendants. The court charged there that the burden of proof was on the plaintiffs to show "that the missing goods were in the box when it was delivered to the defendants at Washington." But under the instruction of the court, when the plaintiffs had proved that the goods were in the box when it left the store, and that there were no suspicious circumstances attending its transportation to the defendant's station, the plaintiffs' had sustained the burden, and the law stepped in with the presumption that the goods were delivered. 3. The error in question was not cured by the charge of the court on the first or second proposition submitted by plaintiffs. The court charged that on the evidence it was a question of fact for the jury whether the missing goods were delivered to the defendants at Washington, but the previous instruction remained that when the plaintiffs had proved certain facts, they could rely on the presumption of law that the goods were delivered. The whole charge is to be read together, and at the end of each proposition charged on the subject, this erroneous construction can be read: "but the court of appeals has said that there being no suspicious circumstances attending those goods on their way from De Wolff's to the depot, the presumption of law is that the goods were delivered." 4. Assuming, but not conceding, that the plaintiffs' view of the subsequent instructions is correct, and that such instructions were contradictory of the one in question, still the error was not cured. It has been shown already that there was no contradiction, and that there was no withdrawal of the misinstruction. Where the court lays down two contradictory rules for the guidance of the jury, one of which is correct and the other is erroneous, there is error, for it is impossible to say which rule the jury followed. (Chidester

v. Cons. People's Ditch Co., 53 *Cal.* 56; Imhoff *v.* Ch., M. & St. P. R. R. Co., 20 *Wis.* 344, 347; Adams *v.* Capron, 21 *Md.* 186, 206; B. & O. R. R. Co. *v.* Blocher, 27 *Md.* 277, 286; Southern R. R. Co. *v.* Kendrick, 40 *Miss.* 374, 388; Vanslyck *v.* Mills, 34 *Iowa*, 375; Catawissa R. R. Co. *v.* Armstrong, 49 *Penn St.* 186, 193). 5. The only way in which the court could obviate the error was to withdraw the erroneous charge in such explicit terms that the jury could not possibly be misled (Chapman *v.* White, 55 *N. Y.* 579; Allis *v.* Leonard, 58 *Id.* 288). If the misdirection may have influenced the verdict, a new trial will be ordered (Greene *v.* White, 37 *N. Y.* 405; Beaver *v.* Taylor, 1 *Wall*, 637, 644).

Estes & Barnard, attorneys, and *Benjamin Estes*, of counsel, for respondent.

BY THE COURT.—FREEDMAN, J.—The action was brought to recover the value of certain jewelry and silver plate which the plaintiffs alleged they delivered to the defendant in a box, at Washington, D. C., to be carried to New York, but which, through the defendant's alleged negligence, were abstracted from the box while in the custody of the defendant.

Upon the trial it was admitted that on May 13, 1872, at Washington, the defendant received from the plaintiffs, for transportation to New York, eighteen boxes and one barrel, and that these packages arrived in New York and were delivered to the plaintiffs' consignees, Sackett, Davis & Co. The contested questions of fact were: 1. Whether the missing goods were contained in one of the boxes at the time of their delivery to the defendant for transportation; and, 2, if they were, whether they were abstracted therefrom before the duty of the defendant for their safe-keeping had ended. Upon both these questions the burden of proof was upon the plaintiffs.

Opinion of the Court, by FREEDMAN, J.

A former verdict in favor of the plaintiffs was set aside by the court of appeals (75 *N. Y.* 144), on the ground of error in the charge, and for the further reason that, although there was sufficient evidence to authorize the jury to find that the missing goods were delivered to the defendant at Washington, the whole evidence, in the absence of proof showing what care was taken by plaintiffs' consignees of the box alleged to have contained the goods, after its arrival in New York, was as consistent with the loss of the goods after delivery to plaintiffs' consignees at New York, as with their loss while in the defendant's custody.

Upon the last trial, the plaintiffs sought to obviate the defect in the proof by showing not only that all the packages were safely carried from the landing place in New York to the store of Sackett, Davis & Co., and that within a few days thereafter the goods in controversy were found missing from one of the boxes, of which immediate notice was given to the defendant, but also, that, while at said store, all the boxes were kept and guarded in such a way that the missing goods could not well have been abstracted there. Upon an examination of the evidence bearing upon this point, which is quite voluminous, I think sufficient care was shown to carry the case to the jury.

Upon the question, however, whether the missing goods were contained in one of the boxes at the time of their delivery to the defendant for transportation, the jury were instructed that upon the evidence adduced the presumption of law was that they had been thus delivered, and that under the ruling of the court of appeals the evidence was sufficient to justify them so to find. In this the learned judge below erred. The evidence was substantially the same as upon the trial which was reviewed by the court of appeals, and all that that court decided with regard to it was, that it permitted the jury to find a delivery. This conclusion

was reached with some hesitation. But the court did not hold that upon a re-trial the jury should be deprived of the privilege of considering the weight and credibility of the evidence. Under this ruling the question of delivery should have been submitted as an open one, and the jury should have been left free to determine it upon their own view of the true weight to be given to the evidence which bore upon it. True, the learned judge below, upon the conclusion of the charge, in response to specific requests, added that the burden of proof was on the plaintiffs to show both that the missing goods were in the box when it was delivered to the defendant at Washington, and that they were not in the box when the box was delivered to Church, the carman, at New York; and also, that on the evidence in the case it was a question of fact for the jury whether the missing goods were delivered to the Baltimore & Ohio Railroad at Washington, and if they believed such to be the fact, that they should find that they were so delivered. But these additional instructions did not cure the error alluded to. They did not withdraw or modify the prior erroneous statement as to the presumption of law and the sufficiency of the evidence, as matter of law, to establish the fact, and the jury were thus left under the impression that after all the plaintiffs had sufficiently established the delivery of the missing goods.

The judgment and order should be reversed and a new trial ordered, with costs to appellant to abide the event.

CURTIS, Ch. J., and SEDGWICK, J., concurred.

Appellant's Points.

JOHN B. PARKER *v.* JOHN J. BRADLEY.

Sheriff—not excused by service on him of attachment against party issuing execution, from obligation to make return.

The sheriff is not relieved from his obligation to make return of his proceedings upon an execution against the property of defendant, by the fact that prior to the return day thereof he was served with a warrant of attachment against the plaintiff, granted upon the application of defendant as plaintiff in another action. If he neglects to return the execution, he is liable to be proceeded against by attachment, and it is no defense that he has not been ruled or notified to make a return. Return can be made according to the facts, and if a sufficient excuse for not paying the money is presented, under the principles of Wehle *v.* Conner (69 *N. Y.* 546) and Dunlop *v.* Paterson Fire Ins. Co. (74 *N. Y.* 145), the court will not compel the sheriff to pay over. The court in this case held that as the sheriff had not been ruled or notified to make return, the order directing attachment against him should be modified by the addition of the words: "unless within ten days a return of it (the execution) shall be made according to the command thereof."

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided June 18, 1880.

Appeal from order directing that attachment issue against the late sheriff of the city and county of New York.

Vanderpoel, Green & Cuming, attorneys, and *Almon Goodwin*, of counsel, for the sheriff, appellant, urged:—
I. The motion is in form to compel a return of the execution, but is, in fact, to compel the sheriff to pay over the $3,500 held by him, and it was argued below upon this theory. The sheriff made no objection then, and does not now, to the return of the execution, in accordance with the facts. The opinion of the judge below shows that this was the point in dispute. "The money

in the hands of the sheriff, collected on the execution against the defendant, belongs to the plaintiff, and cannot be attached while in the sheriff's hands in a suit brought by the defendant against the plaintiff." The decision of the court below was erroneous. The whole question has been recently litigated at great length in this court, and finally passed upon in the court of appeals, in the case of Wehle *v.* Conner (69 *N. Y.* 546). In that case the court held, that where a sheriff, having an execution in his hands, receives an attachment against the judgment creditor, and by virtue thereof levies upon the judgment debt, the attachment becomes a lien upon the judgment and execution, and all moneys collected upon the executions are liable to be applied toward the payment of any judgment recovered in the action wherein the attachment was issued; and, until the attachment is vacated, or the lien thereof in some manner discharged, it must be regarded as a valid process; and the sheriff has no right to pay over to the judgment creditor moneys collected on the execution. That case is on all fours with the present, except that in Wehle *v.* Conner the sheriff had levied upon property; and it did not appear whether the money, *i. e.*, the proceeds of the property, had actually come into his hands. On the re-trial before Mr. Justice FREEDMAN, it appeared that part of the money had come into the sheriff's hands; and the court held that the attachment applied equally to that. FREEDMAN, J., says: "If he had not only made a levy, but had collected the full amount of the executions, the cash in his hands would be bound by the attachment." Appeal was taken by the plaintiff to the general term of this court, and the decision of Mr. Justice FREEDMAN affirmed (Wehle *v.* Conner, MS. opinion).

II. So far as the motion was merely to compel the return of the execution, it was irregular, and should have been denied. We believe that under rule 6 (Gen'l

Respondent's Points.

Rules), it has been the uniform practice for the court to require ten days' notice before ruling the sheriff to return process, and especially so unless some special reason is shown why the rule should be departed from. The only reason given in the plaintiff's affidavit for shortening the time, was that "the assignee desired the immediate payment of said money by the sheriff." The court will not compel the sheriff to return process where there is good reason for retaining it. Until the settlement of the conflicting claims of the parties, the sheriff is bound to retain his process, and apply the money in accordance with the rights of the parties, as finally established.

Charles N. Black, for respondent, urged:—I. The attachment delivered to the sheriff in the suit of Bradley against Parker, in the supreme court, did not dispense with the duty required from the sheriff—to return the execution and indorse his return of satisfaction thereon as required by the statute. If he had any doubt as to the proper disposition of the money, he could have brought it into court, which can control the application of the funds (Wehle *v.* Conner, 63 *N. Y.* 258, 260; 69 *Id.* 546, 549; Dunlop *v.* Paterson Fire Ins. Co., 74 *Id.* 145, 152, 153).

II. The sheriff, having neglected to return the execution, can be proceeded against by attachment or by suit, at the election of the creditor. Nor is it any answer for him to say he had not been ruled to return the execution (Burk *v.* Campbell, 15 *Johns.* 456; Stevens *v.* Rowe, 3 *Den.* 327, 330; 2 *R. S.* 440, 535; *Code Civ. Pro.*, § 14).

III. It does not appear that the sheriff has made a levy under the warrant, as required by the statute, and without such levy no lien could be created (*Code Civ. Pro.*, § 649).

IV. The money collected by the sheriff on the exe-

cution issued against the defendant cannot be attached while in the sheriff's hands, in a suit brought by the defendant against the plaintiff (*Drake on Attachments*, § 543; Hoag *v.* Hoag, 55 *N. H.* 172; Blaisdell *v.* Ladd, 14 *Id.* 129; Belknap *v.* Gibbons, 13 *Met.* 471).

V. The plaintiff having assigned the cause of action to Stratton, in trust for Mrs. Parker, November 15, 1877, and he having assigned the judgment to Watts upon a like trust, the sheriff had no right, as against this assignee, to hold the money he collected under the execution in this case to satisfy a claim against the plaintiff (Baker *v.* Kenworthy, 41 *N. Y.* 215; Wehle *v.* Conner, 69 *Id.* 546, 550).

VI. The money which the sheriff has collected under the execution in this case is not a chose in action and not the subject of garnishment, but personal property, capable of manual delivery, and can only be reached by him, if at all, by levy (*Code Civ. Pro.*, § 649, sub. 2). If the plaintiff had not assigned the cause of action, the money, being still in the hands of the sheriff, would not belong to the plaintiff, and the sheriff could not levy on it under an attachment against him until it was paid over (Baker *v.* Kenworthy, *supra*, 215, 216).

VII. The money collected on the execution in this case went into the hands of the sheriff from the plaintiff in the attachment suit (the defendant here). The rule is that when "the money in the hands of the officer of the law did not go there directly from the debtor in the attachment, but from some other and original and independent source, over which the attachment debtor had no control as an owner," it is not the subject of an attachment (Dunlop *v.* Paterson Fire Ins. Co., 74 *N. Y.* 145, 151).

VIII. The statute requires the sheriff, in executing an attachment, to take personal property capable of

manual delivery into his actual custody. The sheriff had obtained possession of this money under an execution issued out of this court, and that possession could not be interfered with by process from another court (Dunlop *v.* Paterson Fire Ins. Co., 74 *N. Y.* 145, 148, 149, 151; Shinn *v.* Zimmerman, 3 *Zab.* 150).

BY THE COURT.—FREEDMAN, J.—This is an appeal from an order directing an attachment to issue against Bernard Reilly, the late sheriff of the city and county of New York, for neglecting to return an execution against the property of the defendant as required by the writ. On June 11, 1879, the plaintiff recovered a judgment against the defendant for the sum of $4,832.64, and on June 12, an execution was issued thereon to said sheriff. He collected the entire amount, and on September 23, 1879, he paid over to the plaintiff the sum of $1,332,64, on account. The balance he claims to hold under a warrant of attachment issued to him out of the supreme court on or about June 26, 1879, in an action wherein the defendant, John J. Bradley, was plaintiff and the present plaintiff, John B. Parker, was defendant. The warrant commanded him to attach and safely keep the property of the said Parker, or sufficient thereof to satisfy the claim of Bradley, amounting to $2,000, with some three years' interest thereon, besides the costs and expenses of said action. It is conceded that the said warrant of attachment still remains in full force and effect. There is no proof, however, of what the sheriff did under it.

These facts do not constitute a sufficient excuse for omitting to make a return. The statute requires the sheriff to execute the execution according to the command thereof and make return thereon of his proceedings under his hand. The attachment delivered to him

did not relieve him of that duty (Wehle *v.* Conner, 63 *N. Y.* 258; affirming S. C., 40 *Super. Ct.* 24).

He can make a return according to the facts. If by them an excuse for not paying over the money is presented, within the principles decided in Wehle *v.* Conner (69 *N. Y.* 546) and Dunlop *v.* Paterson Fire Ins. Co. (74 *Id.* 145), the court will not compel him to pay over; for whenever a claim is made against a sheriff for money in his hands, and there is any doubt as to who is entitled to it, it is usual for the court, for the protection of the officer, to refuse to compel him to decide the controversy at his own risk (Mills *v.* Davis, 53 *N. Y.* 349). The question, therefore, of the sheriff's liability to pay over, and if he be liable, whether payment should be ordered summarily, should be reserved until after the coming in of the return.

The sheriff having neglected to return the execution according to the command thereof, was liable to be proceeded against by attachment, and it was no answer for him to say that he had not been ruled or notified to make a return (Burke *v.* Campbell, 15 *Johns.* 456; Corning *v.* Southland, 3 *Hill*, 552).

But the fact that he had not been ruled or notified, taken in connection with the other facts relied on by him as an excuse, demanded that before the actual issue of the attachment an opportunity should be afforded to him to make a return. The order directing that an attachment issue against the said sheriff for not returning the execution, should therefore be modified by adding at the end thereof the words, "unless within ten days a return of it shall be made according to the command thereof;" and as thus modified the order should be affirmed, without costs on the appeal.

CURTIS, Ch. J., and SEDGWICK, J., concurred.

Statement of the Case.

MORRIS A. TYNG, RESPONDENT, *v.* THE THEOLOGICAL SEMINARY OF THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF OHIO, APPELLANT.

I. HIRING.

1. CONTRACT OF FOR AN INDEFINITE OR UNDESCRIBED TIME.

(*a*) GENERAL RULE AS TO ITS PERIOD OF CONTINUANCE.

1. From year to year, commencing from the time when the contract takes effect.

1. *Inflexibility of the rule* that the year commences when the contract takes effect. The rule is not inflexible. Each particular case must depend on its own circumstances.

(*a*) MODIFICATIONS.

1. Although a tenancy begins in the middle of a quarter, yet if by agreement the rent is payable on the quarter days, or payments are in fact so made, then, the year for its continuance will, according to the circumstances, date from the previous or succeeding quarter year.

2. Although the contract may take effect immediately on its being made, yet, if the nature of the service to be performed under it is such that the performance of it regularly commences at a certain period of the year and ends at a certain period, no services being performed between the last named period and the recurring first named period in the next year (which circumstances are well known to both parties) *the date of the commencement of the year for the running of the contract as one from year to year under the general rule will be the first named period*, the time intervening between the making of the contract and such first named period forms no part of such year.

(*b*) CONTRACT, HOW DETERMINED.

1. A reasonable notice ending with the year should be given.

1. INSTANCES.

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1. In the case first above put under the head of "modifications," it should be for the end of a year commencing at the previous or succeeding quarter day, according to circumstances.
2. In the case second above put, under the head of modifications, it may be for the end of a year commencing at the period when the performance of the service regularly commences.

1. REASONABLE NOTICE.

1. Question of law for the court

1. *When the facts claimed to constitute it are undisputed.*

(*a*) Thus where the original contract for an indefinite term was for the employment by a corporation of a professor at a certain salary, composed in part of money and in part of the occupation of a house, and the contract by implication of law was determinable by a notice given for October 1, a notice given on July 11 preceding, of a resolution passed July 9, vacating the chair held by the professor, with an offer to pay the money salary up to the following October 1, and permit the use of the house until that time, and the professor received the salary, and occupied the house up to that time, when he voluntarily removed from the house, and for years after made no further claim; the professor having in the June previous to the July in which the resolution was passed been informed by a committee appointed at a meeting of the board of trustees, at which a quorum was not present, that the board did not feel justified in employing him for another year,

HELD,

as matter of law, a reasonable and sufficient notice.

2. CONTRACT FOR A DEFINITE TIME.

(*a*) A contract was made in April, 1870, by a corporate body, a seminary, to take effect July 1, 1870, for the services of a pro-

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fessor, without specifying the time of its duration. On July 9, 1873 (the professor, in the preceding June, having been informed by a committee appointed at a meeting of the board of trustees, at which a quorum was not present, that the board did not feel justified in employing him for the next year), the chair of the professor was vacated by resolution of the board of trustees, of which the professor had notice July 13. In the month of June, of each year, there was an annual meeting of the board of trustees, at which, as plaintiff well knew, provision was made for carrying on the work of the scholastic year next ensuing, and at which it was customary, as plaintiff also well knew, to select the professors who were to perform duty during the coming year, and to fix their salaries; and it further appeared that it was not until after the completion of these arrangements that the salaries thus fixed as so-called annual salaries commenced to run from July 1 of each year.

Held,

that it might be a question whether the first contract was not one for a definite term, to wit, the next ensuing scholastic year, and whether the continuance of the professorship at the annual meetings in June, 1871, and June, 1872, were not new independent contracts for a definite term, to wit, the scholastic year next ensuing each of said annual meetings; if so, whether any action was necessary on the part of the trustees to determine the contract of employment, and if any action was necessary, whether the action had in June and July, 1873, did not of themselves have such effect.

II. MASTER AND SERVANT. PROFESSORSHIPS.

III. LANDLORD AND TENANT.

1. Application of above principles in whole or in part to contracts of hiring in those relations.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided June 18, 1880.

The complaint alleges in substance that defendant engaged the services of plaintiff as a professor in its seminary, and employed him as such for one year from July 1, 1873, to July 1, 1874, and agreed to pay him for his services at the rate of $1,300 per annum, and the occupation of a certain house; that he entered

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on his employment and performed the duties thereof until July 10, 1873, when he was discharged; the defendant, during the whole of the period from July 10, 1873, to July 1, 1874, refusing to allow him to perform the duties of his employment or to pay him therefor, to his damage of $975, with interest thereon.

It appears in the case that he had been paid an amount which would cover the salary at the stipulated rate up to October 1, 1873; and had occupied the house up to that time, and that this $975 covers, at the stipulated rate, services to be performed from October 1, 1873, to July 1, 1874.

There have been two trials of the action. On the first trial a verdict for the plaintiff was directed.

A motion for a new trial was made before the judge who presided at the trial. The motion was granted.

The facts stated in the opinion delivered on granting the motion appeared on the trial, of course in much greater detail; thus the evidence showed, in detail, that there was but one regular meeting of the board of trustees held in each year, and that that meeting was held in the latter part of June; that at this meeting provision was made for carrying on the work of the scholastic year next ensuing, and it was customary then to select the professors who were to perform duty during the coming year, and to fix their salaries; all of which was well known to plaintiff.

It also appeared that the defendant's fiscal year, so to speak, was from July to July, the accounts kept with the professors and the resolutions adopted by the board of trustees being made out on the basis of, and referring to, yearly salaries running from July 1.

It also appeared that plaintiff's professorship was specially endowed; that previous to June, 1873, attempts had been made to close the school, which had

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invariably failed, all of which plaintiff knew; and plaintiff did not believe that the proposition to close the school, made in June, 1873, would or could be carried into effect.

It also appeared that on July 10, 1873, the boards of trustees of almost all the seminaries and colleges in the land had adjourned after completing their arrangements for the ensuing year; that plaintiff found it impossible, after so late a notice of July 10, to obtain similar employment elsewhere, and that he had been invited from New York to Ohio, with his family, in the reasonable expectation of permanence.

The opinion delivered on the motion for a new trial, was as follows:

"SEDGWICK, J.—These facts were proved. The defendants' minutes have the following memorandum, viz.: March 8, 1870, 'Bishop McIlvaine nominates Rev. Morris A. Tyng to the Griswold professorship, which was unanimously confirmed on the motion of Dr. Burr.'

"There was a yearly salary paid at irregular times. There is no evidence as to the rate of compensation or the times when it was to be paid, sufficient to show the intention of the parties, in respect of the intended duration of the employment.

"Certain officers of the defendant, who notified the plaintiff of his appointment, said to him, when he was in Ohio (although there was no evidence that they had any authority to make or modify the contract on behalf of the defendant), that 'they wished me to come out and take possession at the opening of the spring term in April, but I declined to do that, but agreed to come out and to take possession to date from the commencement on July 1.' He again testifies: 'It was stated distinctly at that time, that I would not accept under any condition except that the appointment

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should date from July 1.' And again: 'It was agreed that the period of my connection with the seminary should date from July 1,' and also, 'that I would accept the appointment to date from July 1.'

"The practice of the seminary was, on one of the first days of October, persons presented themselves for admission and were examined. The course of instruction then began. There was a new term that began on April 1, and continued until the last days of June, when there was the examination for graduation and the commencement exercises. The vacation followed to October 1. Through the vacation the professors did no service for the seminary.

"The practice was, that the trustees, at the annual meeting, held in June, made all the arrangements for the year to come. The meeting that was to be held in June, 1873, fell through for want of a quorum, and a new meeting was called for July 8.

"On July 8, 1873, the trustees resolved to close the seminary, and expressing their entire respect for the character, learning and teaching of the plaintiff, declared his professorship vacant. The trustees at the same time directed that an amount equal to the salary to October 1 should be paid the plaintiff, and that to that day he might use the house attached to his professorship. The reason for this action was, that only two students had attended the seminary through the year. Plaintiff received notice of this action of the trustees on or about July 8, 1873. The seminary was entirely closed by the trustees, and there was no duty thereafter to be done by the plaintiff. He received the money and used the house, as voted by the trustees, but has never waived any claim he may have to be paid further amounts for salary.

"His claim is, that there was an employment from year to year; that the contract was entire as to each year; that, by the contract, these years began July

1, when the plaintiff took his seat; that it was not ended by notice before July 1, 1873, and, therefore, continued down to July 1, 1874, and that a notice, after July 1, 1873, could not bring the contract to a close before July 1, 1874.

"There was no proof of usage to aid the construction of the contract. The nature of the contract, however, was so far determined by law that it could not be affected by testimony (which was offered, but excluded) that it was the custom of the seminary in question to retain professors during good behavior; we must mainly rely upon the implication in the situation of the parties, and in the facts to which the contract was to be applied.

"The general rule that a hiring in general, that is, for an indefinite or undescribed time, not expressed to be at will, was to be deemed a hiring for a year, arose from natural equity. 'If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year, upon a principle of natural equity, that the servant shall serve and the master maintain him throughout all the evolutions of the respective seasons, as well when there is work to be done, as when there is not' (1 *Bl. Comm.* 15 Eng. ed. p. 425).

"This general rule is to be applied to cases that have the same character as those in respect of which it was originally made, viz., domestic servants or servants in husbandry. It is applicable to cases like clerks, where there is nothing in the kind of service to give one day more significance than another, and it would be unjust to one side or the other to choose a space of time less than a year for the duration of the contract. But evidently, while this justice is preserved, the rule has no regard for the particular day on which the space of time ends, beyond the demands of uniformity and certainty.

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"If this justice be preserved, and the circumstances clearly show that both sides know the employment was to do a certain thing, which might call for a time shorter or longer than a year by a few days, rather than for devotion of time generally, to repeated instances of service, then, certainly it would be just to put an end to the contract by notice ending with the day of the completion of the thing to be done. In case where, as matter of fact, the time required for the completion of the service was about a year, and was required year after year, it would be just to make a renewal of the yearly service, subject to an ending of the same kind as the first yearly service, although it might not end on the same calendar date. The fact is that at the expiration of the first term there is by a continuance merely in employment, a tacit renovation of the original contract, to use the words of Lord MANSFIELD, in reference to a somewhat analogous subject (Right *v.* Darley, 2 *T. R.* 162), rather than a renewal of right as to the time the first contract endured.

"All general rules have to be restrained by their fitness to the special instances, and this has been said specifically of the present general rule (Baxter *v.* Nurse, 6 *Mann. & G.* 935; 1 *C. & R.* 10 [1844]; Fancraw *v.* Oakford, 5 *H. & N.* 635 [1860]). This last case says that there is no inflexible rule that a general hiring 'is a hiring for a year. Each particular case must depend upon its own circumstance.' The same must be true in reference to the day when the employment is to end. It is not an inflexible rule that such day is to be found by a calculation of the end of a year from the day of the employment.

"An illustration is found in cases of tenancy from year to year. The general presumption is of a year from the date of the commencement of the tenancy, but that is affected in cases where the tenancy begins

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in the middle of a quarter by the agreement of the parties that rent is payable on the quarter days, on the fact of such payments, and according to the circumstances it will be held that for the purpose of fixing the time for notice to quit the year is to date from the previous or the succeeding quarter day (Doe *v.* Johnson, 6 *Esp.* 10; Doe *v.* Stapleton, 3 *C. & P.* 275; *Adams on Ejectment*, Am. ed. of 1821, p. 135).

"In the present case both parties knew that the service called for was to be in the future regular, although the day of the beginning of the employment was July 1. The nature of a course of instruction was that it should begin with the admission of the student in October, and be conducted by the same professor through a time when each day's instruction would have its influence on the instruction of other days. It could not have been meant that such employment should end on April 15, say, of a succeeding year, if accident had called for the employment of a professor on that date of a former year.

"It would be against their common interests and their duty to students to make an agreement that contemplated a sudden departure of a professor in the middle of a term, or even of a year. The nature and necessity of the case imply more than the accidental date of the employment.

"I am of opinion that by the contract the plaintiff was employed from July 1 to October 1, 1870, so as to entitle him to the salary at that time, and then and thereafter from year to year, and that the employment could be ended by reasonable notice given for October 1. The resolution of July 8, communicated on the 10th, was substantially such a notice, and that the plaintiff's claim for compensation was satisfied by the payments made under the resolution.

"For these reasons I was in error in directing a verdict for the plaintiff, which, however, was understood

to be a formal direction, and the motion for a new trial should be granted; the order to be entered *nunc pro tunc* as of the term when the motion was made."

On the second trial the same facts appeared as on the first, with this additional evidence: "Between the commencement in June and the instruction of classes, I had a great deal to do with reference to my professorship; it was necessary, during that time, to make the formal arrangement of the studies and classes for the coming year: the arrangement as to how much time should be spent in the seminary in each department by each class, the hours of instruction, the choice of books, and the preparation of notes and memoranda for furnishing material for instruction for the year; then also my own studies for the instruction of the year."

On the second trial, defendant's counsel, at the close of the evidence adduced on plaintiff's behalf, moved to dismiss the complaint on the ground that plaintiff had not proved a cause of action.

The motion was denied, and defendant's counsel duly excepted.

Defendant's counsel then, without offering further evidence, moved that the court direct a verdict for the defendants, and read from the opinion of Judge SEDGWICK, in reference to the granting of a new trial in this case.

The motion was denied, and defendant's counsel duly excepted.

The court charged the jury, at the request of plaintiff's counsel, "that the contract between plaintiff and defendants, subsequent to July 1, 1873, was a contract for the then current year at a salary of $1,300 per annum, and could only be determined by defendants (plaintiff not assenting to a termination of it), by reasonable notice expiring with the then current year."

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To which charge the defendants' counsel then and there duly excepted.

The question whether such reasonable notice had been given was by the charge left to the jury to determine.

The plaintiff's counsel requested the court to charge that: "If the jury found that the original agreement was that the plaintiff should report for duty on July 1, 1870, and that his salary should be paid from that date, and that he did so report for duty, and that his annual salary was reckoned and paid by defendants from that date, it is to be presumed, in the absence of express proof to the contrary, that the year for which plaintiff was first employed, began on that date, and that every subsequent annual renewal of the employment dated from the same day, *i. e.*, July 1, in each year."

The court so charged, "if the jury believe that was the commencement of the year."

To which charge the defendants' counsel then and there duly excepted.

The jury rendered a verdict in favor of the plaintiff. A motion for a new trial on the judge's minutes was made and denied, and an order to that effect entered. From the order denying the motion for a new trial, and the judgment entered upon the verdict, the present appeal was taken by the defendant.

Nash & Holt, attorneys, and *S. P. Nash*, of counsel, for appellant, urged:—I. There was no evidence on the part of the defense; all the testimony was that of the plaintiff and his witnesses, which was not in any way attacked, and the case should not therefore have been left to the jury. The plaintiff was engaged as professor in 1870, the only evidence of the employment being the following entry in the minutes of the board of March 8: "Bishop McIlvaine nominated Rev. Mor-

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ris A. Tyng to the Griswold professorship, which was unanimously confirmed on motion of Dr. Burr." This was the only record evidence of the original employment. Plaintiff entered upon his duties, and continued until July, 1873, when the professorship was vacated. His case required him to show an employment from year to year, dating the year from July 1. To do this, he proved the resolutions of the board, passed January 18, 1872, reducing the salaries of the professors, as follows: "From and after July 1, 1872, the yearly salaries to be paid by the board shall be as follows," &c., and a resolution of June 10, 1873, restoring the previous rate for the year then about ending. This, with the entries on the account books, showing that his salary dated from July 1, 1870, is the evidence bearing on the question of an annual employment to date from July 1. The plaintiff himself testified and introduced certain correspondence and conversations with Bishop McIlvaine and others. The evidence of the discharge of the plaintiff by vacating his chair was the following: A meeting of some members of the board, not a quorum, at which a committee of conference was appointed to confer with the plaintiff as to the advisability of his leaving the board free at their next meeting "to make new arrangements for the coming year," plaintiff's own account of his conference with the committee, and the final resolutions, passed July 9, vacating his professorship. These recited "a suspension of the work of the seminary on account of the want of students." Plaintiff's position was, that, before this was done, on July 9, that is, before there had been a formal act of a full board, he had entered on the next year, and that a contract for that year had taken effect. There was no question of fact upon this evidence to submit to the jury. Either on the conceded facts plaintiff was employed for a year from July 1, 1873, or he was not. If he was, he could not be discharged by

any notice, however reasonable; if he was not, there was no legal necessity for any notice. It seems clear, therefore, that the charge was based upon an erroneous view of the rights of the parties.

II. Though the salary of the plaintiff was payable yearly, there was no contract from July 1 to July 1 in each year. It is quite clear that at the commencement in each year, any professor would have felt free to leave. If any annual contract can be implied from the facts, it is a contract for the *scholastic* year, which ended with the dispersion of the students in July, and commenced again in October (see opinion of SEDGWICK, J.). If plaintiff was paid, as he was, for his entire service in 1872–3, no new year began until the opening of the seminary in October, 1873, and it did not then open.

III. Assuming that the previous year ended on July 1, 1873, and that no formal action of the board was taken before July 9, the mere lapse of the nine intermediate days without service rendered to, and accepted by, the corporation, cannot create a contract for another year. It is not like a holding over of a tenant. A contract cannot be forced upon a party, especially upon a corporation, and when it is said that a contract is implied, it is meant that the evidence shows that both parties understood that a contract had been agreed to. This cannot be said in the present case. Plaintiff testified that the first duty of instruction he performed was in October, 1870; "I did no duty as instructor after the commencement in June, 1873." No contract can be implied for another year from this state of facts.

IV. The evidence of the correspondence and conversations of plaintiff with Bishops McIlvaine and Bedell was erroneously received. This evidence was commented on in the charge as "illustrating" the contract. There was no evidence that these persons had a right to bind the corporation. The contract which was

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sought to be proved by the conversation, that is a contract made in March, 1870, for an engagement for a year, to begin in the succeeding July, would not have been valid unless in writing, and the contract in fact made was shown by the records of the board.

V. The verdict was also against the weight of evidence, and a new trial should be granted.

O. P. Buell, attorney, and of counsel, for respondent, urged:—I. As to exceptions to the refusal of the justice on the trial to dismiss the complaint, or to direct a verdict for the defendant. The two exceptions present the same question. 1. The case was properly submitted to the jury, upon the question whether the defendant gave the plaintiff reasonable notice of its election to terminate the employment. In all cases where different inferences may fairly be drawn from the testimony by different minds, the question of reasonable notice—like reasonable time, reasonable care and diligence, and other kindred questions, falls within the legitimate province of the jury. In Railroad Co. *v.* Stout, the rule is thus stated: "Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case is properly left to the jury" (17 *Wall.* 657). And by SELDEN, J., in Bernhard *v.* Rens. & Sar. R. Co., thus: "If there are inferences to be drawn from the proof, which are not certain and incontrovertible, they are for the jury" (1 *Abb. Ct. of App. Dec.* 134). In Taylor *v.* Bryden, KENT, Ch. J., says: "The question of reasonable notice is a compound of law and fact to be submitted to a jury" (and see cases cited in opinion, 8 *Johns.* 173, 177; see also Brink *v.* Hanover Ins. Co., Ct. of Appeals, March, 1880, 9 *Reporter*, 518; 3 *Kent Comm.* 67; Farmers' Loan & Trust Co. v. Hunt, 16 *Barb.* 514; Whitbeck *v.* Holland, 45 *N. Y.* 13, 18, GROVER, J.; Wakeman v. Gowdy, 10 *Bosw.*

213; Bartlett *v.* Robinson, 39 *N. Y.* 187; Thurber *v.* Harlem, &c. R. Co., 60 *Id.* 321, 331, ALLEN, J.; Viner *v.* N. Y. Steamship Co., 50 *Id.* 23).

II. Even though it be assumed that the contract ran from October 1, in each year (and not from July 1), still the question remains, was a notice served on plaintiff on July 10, for October 1, following, a reasonable notice under the circumstances proved in the case? Plaintiff proved, for instance, that at such time (July 10) the boards of trustees of almost all the seminaries and colleges in the land had adjourned, after completing their arrangements for the ensuing year. And plaintiff found it impossible, therefore, after so late a notice, to obtain similar employment elsewhere. Moreover, he had been invited from New York to Ohio, with his family, on the reasonable expectation of permanent employment. Defendant offered no evidence to mitigate these facts.

III. The conference in June was not notice. The committee which waited upon plaintiff in that month, was authorized simply to obtain his views, as to the "advisability" of leaving defendant's trustees free to make new arrangements, *i. e.*, for closing the seminary. He declined to accede to the proposition, and expressed himself emphatically against this policy. He therefore had every reason to believe, and he did believe, the matter would end there. His professorship was specially endowed, and a perversion of its funds, as proposed, to other objects, would be a breach of trust. He knew that similar attempts, in former years, to close the school, had invariably failed. The inference from these proved facts was, at all events, for the jury to draw.

IV. The case was properly submitted to the jury to determine upon all the evidence, what was the contract between the parties. (1) The contract was not in writing. The resolution of defendant's board of trust-

ees of March 8, 1870, merely "confirmed" Bishop McIlvaine's nomination of plaintiff as professor. The nature and terms of the contract could only be inferred from facts *aliunde*. The question, therefore, what was the contract, became a question for the jury (First Nat. Bank of Springfield *v.* Dana, 6 *W. D.* 203; S. C., in Court of Appeals, 9 *W. D.* 322; and see cases cited, *supra*, under Point I.) (2) The opinion of Judge SEDGWICK renders unnecessary a further discussion of the legal presumptions as to contracts of hiring. His discussion of the subject is full and complete. To the accuracy of the legal principles he enunciates, we fully accede. A general hiring is presumed (in the absence of modifying circumstances) to be for a year; and when the relation is continued after the expiration of the first year, this hiring is thereby construed to be from year to year, terminable by either party upon reasonable notice, having reference to the expiration of the current year (Bleeker *v.* Johnson, 51 *How. Pr.* 380; Beeston *v.* Collyer, 12 *J. B. Moore*, 552; G. & B. S. M. Co. *v.* Bulkley, 48 *Ill.* 189, 192; Laughran *v.* Smith, 75 *N. Y.* 205, 209, 210). But, as remarked by Judge SEDGWICK, "there is no inflexible rule." And, as stated by POLLOCK, B., in Fairman *v.* Oakford (5 *H. & N.* 635), quoted in Judge SEDGWICK's opinion: "Each particular case must depend upon its own circumstances;" and the inference from these circumstances he held to be a matter for the jury (Bank *v.* Dana, *supra;* White *v.* Hoyt, 73 *N. Y.* 505; 2 *Parsons on Cont.* 5 ed. 492, note *b*, and cases cited).

V. Counsel for appellant is obliged to contend (in support of these "Exceptions"), that there is no evidence from which a jury could intelligently and honestly infer that the contract existing July 10, 1873, was a contract for one year from the 1st of that month. He insists that the court should have taken the case away from the jury, and decided as matter of law, that

the current yearly contract would have expired on October 1, 1873. (1) It will not be disputed, we suppose, that the date of the commencement of the first year's employment determines the date of every succeeding annual renewal of the employment (Authorities cited under Point IV., *supra;* opinion of Judge SEDGWICK, and cases cited by him). (2) Now, about the only fact relied upon by appellant, as indicating that the annual employment dated from October 1, is that the students came together for instruction, after the summer vacation, on the first Thursday in October —some day from the 1st to the 7th of October. The day of the opening of the fall term, it is undisputed, was a matter within the exclusive control, from time to time, of the trustees. An omission of proof on the first trial led Judge SEDGWICK to remark as follows: "Through the vacation the professors did no service in the seminary." This omission, thus called to our attention, we have supplied on the present trial, and have shown that important services were rendered by the professors during the vacation. (2) On the other hand, the evidence is, we submit, abundant and conclusive, that July 1, and not October 1, was the date of the original year's employment, and of every successive annual renewal of such employment. 1st. It was so expressly agreed to between plaintiff and defendant's chief executive officers—their president and vice-president. Plaintiff's testimony on this point is explicit and direct. He is not impeached nor contradicted, although it was open to defendant to call Bishop Bedell as their witness, had they been able to contradict the plaintiff. As the general and chief executive officers of the defendant corporation, Bishops McIlvaine and Bedell were authorized, in furtherance of the ordinary and legitimate purposes of the corporation, under the resolution of March 8, 1870, to close with plaintiff upon the terms and details of the con-

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tract thus authorized (McCarty *v.* Selingroove, &c. R. Co., 87 *Penn. St.* 332; Fayles *v.* National Ins. Co., 49 *Mo.* 380; *A. & A. on Corp.* § 231). Their authority to bind the corporation "may be implied from facts and circumstances" (*A. & A. on Corp.* § 283). But the uncontroverted evidence in the case shows that the acts of its chief executive officers in the premises, were fully ratified and affirmed by defendant's board of trustees (*Id.* § 284; 2 *Kent Comm.* 291, 292). 2d. Plaintiff reported for duty at the annual commencement in 1870, and took part at a faculty meeting. He was thereafter subject to defendant's orders. 3d. Plaintiff was, at the outset, employed at an "annual" salary, to wit: $1,300 a year, and a house. This is the undisputed testimony, and the express allegation in defendant's answer. 4th. All the resolutions of the board, and all their accounts with plaintiff, show that their business year—their year for the employment of professors and the payment of their salaries—began July 1 (2 *Kent. Comm.*, *supra*). 5th. There was but one regular meeting of the board during the year, to wit: just before the commencement, in the latter part of June, when all the arrangements for the ensuing year were made.

VI. As to the exceptions to the judge's charge. The exception at fol. 120 is not well taken. The employment could only be terminated by reasonable notice, expiring with the then current year, whenever that year expired (Judge SEDGWICK's opinion, and cases cited by him; Decker *v.* Hazell, 26 *How. Pr.* 528; Loughran *v.* Smith, 75 *N. Y.* 205, 209, 210).

VII. The proposition excepted to at fol. 121 is a mere corollary from the preceding one. Moreover, the qualification added by the learned justice practically reduced it to nothing.

VIII. The proposition excepted to at folio 122 is unquestionably sound. The justice was careful that

the jury should not mistake its proper application (Costigan *v.* Mohawk & Hudson R. R. Co., 3 *Den.* 609; Vail *v.* Jersey Little Falls Co., 32 *Barb.* 564; Nations *v.* Cudd, 22 *Tex.* 550; Cook *v.* Sherwood, 3 *Fost. & Fin.* 729; Whittle *v.* Frankland, 2 *Best & Smith*, 49).

IX. The defendant has had a fair trial, and the judgment and order appealed from should be affirmed, with costs.

BY THE COURT.—FREEDMAN, J.—The respondent, in his points, acknowledges that, so far as this case is concerned, the opinion delivered by Judge SEDGWICK on a former occasion is a full and complete discussion of the legal presumptions as to contracts of hiring, and that the accuracy of the legal principles enunciated by him is fully acceded to. The respondent's contention is, that, notwithstanding all that was said, the question of reasonable notice was not, at the last trial, determinable as one of law, but was properly left to the jury as one of fact, and that therefore the verdict cannot be disturbed. In this I think the respondent and the learned judge who presided at the last trial were mistaken.

Upon plaintiff's own showing it appeared that the actual work of each year commenced in the month of October; that in the month of June of each year there was an annual meeting of the board of trustees, at which, as plaintiff well knew, provision was made for carrying on the work of the scholastic year next ensuing, and at which it was customary, as plaintiff also well knew, to select the professors who were to perform duty during the coming year, and to fix their salaries; and that it was not until after the completion of these arrangements that the salaries thus fixed as so called annual salaries commenced to run from July 1 of each year.

It further appeared that at the meeting of the board

called for June 10, 1873, a quorum did not attend, but that a committee was appointed to confer with the plaintiff; that by said committee the plaintiff was informed that as there were no students, the board did not feel justified in employing him for the next year; and that finally, at a meeting of the full board, held July 9, 1873, a resolution was adopted vacating the chair held by the plaintiff, of which the plaintiff had notice on the 10th or 11th of July.

Upon this uncontroverted state of facts it may be a question whether there was a legal necessity for any notice; but upon the assumption that there was, the notice given, coupled as it was with a tender of the use of the house then occupied by the plaintiff until the following October 1, and an offer to pay him up to the day last named at the rate at which he had been paid, which terms the plaintiff subsequently accepted, was sufficient. Plaintiff himself seems to have so regarded it, for with the exception of an additional small sum then claimed by him for some repairs and improvements on the house, which was allowed to him, he neither then, nor for years thereafter, made any further claim, but voluntarily removed from the said house.

Defendants' motion for the dismissal of the complaint should therefore have been granted.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to appellant to abide the event.

CURTIS, Ch. J., and SEDGWICK, J., concurred.

Opinion of the Court, by FREEDMAN, J.

HENRY J. SMITH, APPELLANT, *v.* JAMES G. TIGHE, ET AL., RESPONDENT.

Assignment for benefit of creditors—effect thereon of discharge in bankruptcy.

Where an assignee for benefit of creditors has received assets, it is no defense to an action for an accounting, brought against him by the creditors, to allege that, since the execution of said assignment, the assignor has been discharged in bankruptcy from the debts thereby secured, under proceedings instituted after the assignment. The beneficiaries under the trust created by the assignment, *i. e.*, the creditors, have a vested interest in the assigned property, and its proceeds, to the extent of their respective claims.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided June 18, 1880.

Appeal from judgment and order overruling demurrer.

The facts appear in the opinion of the court.

M. Compton, for appellant.

J. G. Tighe, respondent, in person.

BY THE COURT.—FREEDMAN, J.—This is an appeal from a judgment and an order entered at special term, overruling the demurrer interposed by the plaintiff to that part of the answer of the defendant Tighe, which sets up as a defense the discharge of the defendant, Thompson, under the United States Bankrupt Act. The action was brought in 1872, by the plaintiff, on behalf of himself and all other creditors of the defendant Thompson, on December 1, 1865, who might in due time come in; and its object is to compel an accounting by the defendant Tighe, as the assignee of Thompson, for the benefit of creditors.

The most material allegations of the complaint are,

in substance, that on December 1 and 2, 1865, under the laws of this State, Thompson executed an assignment for the benefit of his creditors to Tighe; that by the terms of the assignment, Tighe was directed to sell the assigned property and convert it into money, and with the proceeds thereof to pay in full the debts and liabilities existing against Thompson on December 1, 1865, provided there should be sufficient funds for that purpose, and in case there should not be sufficient funds, then to apply the proceeds *pro rata* to the payment of such debts and liabilities, in proportion to their respective amounts; and in case of a surplus remaining after the payment of such debts and liabilities, to return the same to the assignor; that the notes described in the complaint, amounting together to over $7,000, were legal debts and liabilities, existing against Thompson at the date of the assignment; that Tighe took possession of the assigned property under said assignment, and converted the same into money; that he realized therefrom the sum of $90,569.94, and that out of this he paid dividends to creditors, amounting in the aggregate to only $3,415.71, of which $334.72 only were paid on account of the notes set forth in the complaint.

To this complaint Tighe interposed, among other things, the defense in bar, that, on July 6, 1871, Thompson applied for, and on December 9, 1871, obtained a discharge in bankruptcy, and a copy of said discharge is set forth in full.

To this defense the plaintiff demurred, on the ground that it was no defense as to the defendant Tighe.

In my opinion the demurrer was well taken and should have been sustained on the merits.

Except in a few instances specifically enumerated, but which have no application to the case at bar, the bankrupt act, while it was in force, preserved the rights of creditors by mortgage, pledge or other lien upon the property of the bankrupt, whether created

by his act or by operation of law, and the assignee in bankruptcy took the property subject to such mortgages, pledges or other liens (Jerome *v.* McCarter, 94 *U. S.* [4 *Otto*] 734; Yeatman *v.* Savings Institution, 95 *U. S.* [5 *Otto*] 764). And the same courts remained open to the creditors for the enforcement of such vested rights, that were open to them before (Eyster *v.* Gaff, 91 *U. S.* [1 *Otto*] 521).

An assignment for the benefit of creditors, made by an insolvent debtor under the laws of a State, in good faith, without intent to defeat the object, impair or impede the operation, or evade any of the provisions of the bankrupt act, and which transferred all his property without preferences, was not in violation of the spirit and intent of the bankrupt act and consequently was not void *per se* (Thrasher *v.* Bentley, 59 *N. Y.* 649; Haas *v.* O'Brien, 66 *Id.* 597; Mayer *v.* Hellman, 91 *U. S.* [1 *Otto*] 496). To remove all doubt upon this point, Congress, by chapter 234, passed July 26, 1876, expressly enacted that no voluntary assignment by a debtor of all his property, made in good faith for the benefit of all his creditors, ratably and without creating any preference, and valid according to the law of the State where made, should of itself be a bar to the discharge of such debtor.

In the case at bar as presented by the pleadings it is manifest that Thompson, by the assignment, divested himself absolutely of the assigned property, except as to surplus, and the assigned property became in equity the property of his creditors. Tighe, though the legal title became vested in him for the purposes of the execution of the trust, was constituted only the legal agent for the disposition of the property according to the terms and for the purposes of the assignment, and as such he is accountable to the beneficiaries under the trust. In a suit to compel such an accounting it can be no answer for him to say that, since the assign-

ment, the assignor has been discharged under the bankrupt act from the indebtedness to secure which the assignment was made. If the claim now advanced by Tighe in that respect were sound, if the beneficiaries under the trust have not a vested interest in the assigned property and the proceeds thereof, what is to become of the property and its proceeds? Certain it is that neither the property nor the proceeds went into the hands of the assignee in bankruptcy. This being so, can it be then that Tighe can keep the proceeds and appropriate them to his own use, or do they revert back to the assignor as a discharged bankrupt without an execution of the trust? The bare statement of the proposition carries with it its refutation. The only effect the discharge pleaded can have in this case, is to discharge Thompson from any balance of indebtedness that may remain after the application of the assigned property and its proceeds by Tighe to the purposes specified in the assignment. The case of the Ocean Bank *v.* Olcott (46 *N. Y.* 12), does not sustain the claim made here. In that case the creditors had no lien, but by action brought after the debtor's discharge in bankruptcy they sought to establish one, under the statute of uses and trusts, against real property held by the debtor's wife, by insisting that said property had been paid for out of moneys belonging to the debtor, and that the title to it had been taken by, and in the name of, the wife, in fraud of creditors. The court held that the statute referred to does not give a specific lien upon the property, but an equitable right, to be enforced by suit in equity, after all available legal remedies are exhausted; that the commencement of the equitable action and the filing of a *lis pendens* are necessary to constitute a lien; and that, as it appeared, that, before the commencement of the action, the judgment or debt which constituted the foundation of it had been extinguished, and the relation of debtor and

creditor terminated, and the discharge being conclusive upon the State courts, the action would not lie.

The foregoing considerations being decisive of the main question involved, it is unnecessary to consider whether the discharge relied upon was sufficiently well pleaded in point of form.

The judgment and order appealed from should be reversed with costs, and an order entered, awarding judgment to the plaintiff on the demurrer, with costs.

CURTIS, Ch. J., concurred.

MATILDA W. STEVENS, ADMINISTRATRIX WITH THE WILL ANNEXED OF RUSSEL D. MINER, DECEASED, APPELLANT, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, RESPONDENT.

I. REAL ESTATE.

1. HIGHWAY, WATER-COURSE OR PUBLIC STREET.

(*a*) BOUNDING BY, UPON OR ALONG, OR OTHER EQUIVALENT PHRASES—EFFECT OF.

1. Title to the center of the highway, watercourse, or street will pass, *unless* by the terms of the grant, as interpreted and illustrated by surrounding circumstances, or necessary implication, *an intent to exclude* the highway or street or bed of the stream is made to appear.

1. *Intent to exclude, what does not show.*

1. When the land conveyed is described as a certain lot designated on a certain map by a certain number (*e. g.*, 148), and is there bounded on each side by streets laid out on said map, and then gives dimensions which exclude the streets,

(*a*) A COLORING, ON THE MAP, from which it would seem that the whole street on the north, but no part of the street on the south, was included

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within lot 143, as laid down on the map, is not sufficient, even when taken in connection with the reference to the map contained, and the dimensions given, in the deed, to show an intent to exclude the street on the south, and, therefore, title passes to the center of that street.

(*b*) SITUATION OF PARTIES.—When no right to possession in the land appropriated for the purposes of a street thereafter to be opened passed to the contiguous owner until it was closed, and the only purpose and object for which the original grantor could wish to retain any interest in the land so appropriated, was that the street could thereby be actually opened without paying anything to the adjoining owners for the land, which object and purpose wholly ceased upon the street being definitely abandoned as a highway, there is nothing in the situation of the parties showing an intent to exclude the street from the operation of the grant.

2. BOUNDARY LINE.

(*a*) PRACTICAL LOCATION OF.

1. Where there is no agreement between the parties as to the boundary line, there, although a division line has been actually in existence and the parties have severally occupied according, yet, if such existence and occupation has been for less than twenty years, the fact of their acquiescence in the line *as a boundary line* must be found to establish it as a boundary line by practical location.

(*a*) *Intent not sufficient of itself to practically locate.*

1. A line cannot be practically located by an intention in the minds of parties to locate it in a certain place, when, in fact, they locate it somewhere else.

II. ESTOPPEL.

1. *Payments of taxes and assessments.*

A mere payment of taxes and assessments upon land, by one claiming title thereto, will not preclude the true owner from asserting his title, such payment being made without his knowledge.*

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* It is not intended to hold that such payment, *even with knowledge of the true owner*, would work an estoppel.

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III. FRAUD—ACTION UPON.

1. *A common law action, for deceit,* based on actual fraud, in which the allegations of fraud go to the very foundation of the action, and are not simply attached as incidents to the cause of action,

CANNOT BE SUSTAINED AS

an equitable action, brought to charge defendant as trustee for plaintiff, on the ground of constructive fraud.

2. CONSTRUCTIVE FRAUD IN EQUITY, WHAT NOT SUFFICIENT TO CONSTITUTE.

1. *Special information—difference in.*

(*a*) The fact that there is difference in the special information of the parties on the subject, will not constitute an element tending to establish constructive fraud, *unless* there are relations of confidence between the parties or their agents.

2. *Haste or surprise.*

(*a*) This, if there is no *management or influence to* mislead the complaining party, and *no pressure* brought to bear on him to cause him to act without due deliberation, and the cause is such as that an action cannot be maintained based solely on mistake, will not constitute an element tending to establish constructive fraud.

3. *Inadequacy of consideration.*

(*a*) This, standing alone, does not, under the circumstances appearing in the case, raise a constructive fraud.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided June 18, 1880.

This action was brought to recover damages alleged to have been sustained by plaintiff's testator, by reason of defendants obtaining from him by false and fraudulent statements and misrepresentations, and by fraudulent concealment, for a small consideration (to wit, $25), a deed or release of the northerly half of a street sixty feet in width, lying between lots 140 and 143, and the East road (now Fourth avenue), and the Middle road (now the Fifth avenue) as shown on a map of the Common Lands of the mayor, aldermen and commonalty of the city of New York, as surveyed by

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Carmine H. Goerck, in the year 1796, on file in the office of the comptroller of the city of New York; of which strip plaintiff's intestate claimed to have been the owner in fee at the time of giving the deed or release.

The action was first tried before the court and a jury, the present plaintiff's testator being then alive and being the plaintiff. A verdict was directed for the defendant on the ground that plaintiff was estopped from asserting title to the strip in question, in any action whatever.

On appeal from the judgment entered on this direction, the general term (without considering the issue of fraud) reversed the judgment and ordered a new trial, on the ground that the evidence as to the plaintiff's title to the land was not conclusive in favor of defendant.

The issues were thereafter referred to a referee for trial.

The facts are sufficiently set forth in the general term opinion, reported in 37 *N. Y. Super. Ct.* 171, and in the following opinion of the referee, delivered on deciding the action in favor of defendant.

HAMILTON COLE, Referee.—Before the commencement of the trial before me, the plaintiff, Russell D. Miner, died, and the action was revived in the name of his executrix, Matilda D. Walbridge. During the pendency of the action before me, Matilda D. Walbridge also died, and the action was again revived in the name of Matilda W. Stevens, as administratrix of Russell D. Miner, with the will annexed.

In the opinion of the general term of this court, above referred to, so full and accurate a statement of the facts bearing upon the question of the title to the property mentioned was made, that it is unnecessary that they should be re-stated here. The question of

fraud must be examined here as an original question, and upon this point no aid can be obtained from the opinion of the general term. That question was not involved in the determination of the case as there presented.

The case now made does not greatly vary from the case before the general term. Some of the documents then in evidence are now omitted entirely, or are in evidence in a restricted form, as bearing merely upon the intent of the defendants' agent in procuring the deed which will be hereafter considered; and the petition of John Woodward, and the report thereupon, which were before the court at general term on an appeal from an order denying a motion for a new trial, on the ground of surprise and newly discovered evidence, are now in the case; but it appears from a reference to the opinion of the general term, at page 199, that they considered this petition and report in their investigation of the case. So far as the facts established on the former trial bearing upon the question of title are concerned, leaving out of view, for the present, those matters which the general term held to be questions for the jury to pass upon, I think the case now made is substantially the same as that presented to the general term of this court.

The first question to be determined is the nature and extent of the interest of Russell D. Miner in the property in question, on July 7, 1866; and if it shall appear that on that day Russell D. Miner was the absolute owner in fee, and entitled to the possession of the said property, it will then become necessary to examine the question of fraud, upon the determination of which this action must then depend.

The plaintiff insists that the question of title is not necessarily to be determined from the evidence in this case, and claims that subdivision 5 of the defendants' answer constitutes an admission of record that the title

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to the property in question was in Miner, on July 7, 1866, which the defendants cannot contradict, explain away, or deny; and this claim is, I suppose, based upon either of two familiar principles of law: One, that a grantee, holding and claiming under a deed, is bound by the recitals, and liable upon the covenants contained in the deed; or upon the well-settled principle, that parties to actions are not allowed to deny facts established by the pleadings. The first principle can hardly be made to apply in this case in such a manner as to prevent the defendants from questioning the extent of the interest conveyed to them by the deed from Miner; and as to the application of the other principle mentioned, I think the fact alleged in subdivision 5 is, that Miner did, on the day mentioned, execute and deliver to the defendants a conveyance of the premises in question, and that this is the fact which cannot be contradicted by the defendants. The effect of the whole answer is to contradict that such conveyance was operative to convey any interest in the premises, inasmuch as the pleadings, taken as a whole, clearly put in issue Miner's title.

The question of title must be determined upon the proof and not upon the pleadings in the case.

The defendants insist that the record under which Miner claims title to the property in question fails to establish such title, because:

1. The grant from the defendants to David Wagstaff, in 1801, did not convey land to the center of the old street adjoining lot 143.

2. If title to the center of these old streets was conveyed to David Wagstaff by the deed, such title did not pass beyond John Woodward, and the deed from him to William Wagstaff did not pass such title.

3. If in law the legal title to the premises in question did, by the prior deed, vest in Miner, and if, on July 7, 1866, such title, so far as all records showed,

was absolute in Miner; still he cannot enforce such title, because, by the acts or acquiescence of himself and his ancestors in the title, a boundary line between lot 143 and lot 140, then owned by the defendants, excluding the premises in question, had been established and acquiesced in by all parties interested for more than twenty years prior to the commencement of this action.

4. That an estoppel *in pais* has been worked against Miner by his own acts in standing silently by and allowing the defendants to pay taxes and assessments upon the property in question, which precludes him or his successors in interest from now asserting title to said premises.

Unless the law has been changed since the decision of the general term in this matter, the first two points taken by the defendants have been expressly overruled. The general term of this court held that the deed from the defendants to David Wagstaff conveyed to him the premises in dispute, and although, in the opinion, the effect of the intermediate deeds from David Wagstaff down to Russell D. Miner was not commented upon, these deeds must have been considered by the court. It was held that Miner had a good record title, and to decide this, the whole chain of title must have been considered. Under these circumstances a referee or a judge sitting at trial term would and should require very decisive proof that some new facts had been injected into the case, which would require different principles of law to be applicable, or that the principles of law laid down by the general term of the court had been clearly overruled.

I think it now established that deeds conveying property bounded by a highway, water-course or public street, are to be construed in the light of the intent of the parties, and not upon principles of public policy merely, and it may be that this principle of law has

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been authoritatively announced since the decision of the general term in this case (English *v.* Brennan, 60 *N. Y.* 609; White's Bank of Buffalo *v.* Nichols, 64 *Id.* 65; Mott *v.* Mott, opinion Ct. of Appeals, not yet reported).

If the terms of the deed be clear, this intent must be ascertained from the terms of the deed itself; if the terms of the deed be ambiguous, then the intent of the parties may be shown by evidence *aliunde*, and the situation and condition of the parties and of the subject-matter may be considered in determining such intent; but giving the defendants the benefit of any doubt upon this point, and considering both the terms of the deed from the defendants to David Wagstaff, the situation of the parties and of the subject-matter of the grant, and all the evidence in the case bearing upon the question of intent, I still should come to the same conclusion as the general term in my construction of this deed. The boundary in the deed is by a street sixty feet in breadth, but the street is nevertheless the boundary and not the side of it. The law is too clearly established in this State for me to even temporarily disturb it, that where a boundary is mentioned as an entirety the deed conveys to the center of the boundary, and the fact that the boundary is described as having space and not as a line, does not, to my mind, convey any impression that the grantor intended his grant to stop short at the side of the space which is mentioned and described as an entirety.

Nor do I think that the coloring on the Goerck map shows an intent on the part of the defendants to exclude from the grant to David Wagstaff the street on the south of lot 143. If we can consider the coloring at all, and are not bound to be governed in construing this map by the lines, we must, I think, consider the scheme as laid down in the Goerck map, and the fact

therefore becomes material that if this intent, on the part of the defendants, to exclude from the grant to David Wagstaff the street on the south of lot 143, is to be inferred from the coloring on Goerck's map, it must also be inferred that the whole street on the north of lot 143 would be included in the grant of lot 143. The intent to exclude the one would necessarily include the intent to include the other, and neither can, I think, be justly inferred.

Nor does the situation of the parties to this deed make the inference at all necessary that the defendants intended that the grant to David Wagstaff should stop short at the northerly line of the old street. No right to possession in the old street passed to the contiguous owner until it was closed. The defendants, at any time prior to the closing of the street, could have actually opened it without paying anything to the adjoining owners for the land, and this was the only purpose and object for which the defendants could wish to retain any interest in these old streets. There appears to be no reason why the defendants should desire to retain any interest whatever in these old streets after they had been definitely abandoned as highways.

I think John Woodward by his deed to William Wagstaff intended to and did convey all the interest he had in lot 143. This conveyance was made in 1833. Seventy-ninth street had then been opened, and Seventy-eighth street, as afterwards, in 1850, opened, had been laid out on the map made and filed in April, 1811, under the act of April 3, 1807. Seventy-ninth street, as opened, was just to the north of the old Ninety-ninth street, as laid down in the Goerck map, and included no part of that old street; while Seventy-eighth street was partly on lot 143, and a strip of its southerly part between Fourth and Fifth avenues and about five feet in width was on the north part of

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Seventy-eighth street, as laid down on the Goerck map. When Woodward made his conveyance to William Wagstaff, the fences which he had erected around lot 143 included the old Seventy-ninth street on the north and excluded the old Seventy-eighth street on the south, but it seems clear to me that he did not understand that the boundaries which he had made about lot 143 properly included his property, for he petitions the common council to reform the lines about his property so as to conform to these boundaries.

This is not done when he conveys to William Wagstaff lot 143, according to the Goerck map, "*and not otherwise.*" He substantially says: I am in possession of land to which I have no title. My title depends upon the Goerck map. I will convey to you by that map. The legal effect of the deed to William Wagstaff, standing by itself, was to convey to him the premises in dispute, and this legal effect is not to be overcome by shadowy inferences. If the construction of the Goerck map and of Woodward's acts, as contended for by the defendants, be correct, then we must assume that Woodward intended to grant to William Wagstaff all of the old street to the north of lot 143, which he did not claim to own, as shown by his petition to the common council.

The additional language in the deed, after the description, to the effect that the lands are conveyed according to the Goerck map, *and not otherwise*, indicates, to my mind, that Woodward knew at the time that he was not on the land which he really owned, and he therefore proposed to convey to William Wagstaff not the land which he (Woodward) was occupying, but the land which he owned under the conveyances to him, and he therefore, in the grant, distinctly refers to his own sources of title, and takes care to say, in his grant, that not his apparent right, as evidenced by his possession, but that his record title shall

determine the amount of his grant. Whatever interest was granted by the defendants in 1801 to David Wagstaff descended, in my opinion, by an unbroken chain of title to, and was, so far as the records showed, on July 7, 1866, vested in Russell D. Miner.

I now come to the consideration of a question very carefully argued in this case, the question of practical location. The defendants insist that the boundary line between lot 143 and the premises of the defendants on the south was by the parties in interest practically located so as to exclude from lot 143 the premises in question, and that for more than twenty years previous to the commencement of this action there was an acquiescence in such practical location, on the part of all parties interested therein or affected thereby.

On the former trial the decision appeared to rest upon the ground that Minor's grantors, or some of them, had abandoned to the defendants the premises in question, and in exchange therefor, had entered upon, occupied and enjoyed a strip of land on the south side of Seventy-ninth street, as opened, equal or exceeding in amount and value the land so abandoned on the south side of Seventy-eighth street. This would seem to amount to an oral exchange of lands, and it is not now claimed that this can be done. The defendants now claim, entirely irrespective of what took place between Miner's grantors and the defendants, in relation to lands on the south of Seventy-ninth street, and north of lot 143, that by the acts of the parties in interest the boundary line on the south of lot 143 was to established as to exclude from lot 143 the strip of land now involved in this controversy.

The facts upon which this claim is based, I understand to be as follows: The first line claimed is shown in the Randall map (Exhibit No. 8). There is no evidence when or by whom, or for what purpose this line was established, or when it was abandoned. It did

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not exist in 1822, when Mr. Ludlum made his survey of the common lands.

In 1822 it seems that there was a continuous fence which appeared to have been standing a long time, and which stood on the southern boundary of lot 143, excluding the whole of the old street to the south of the lot. How long it had stood there does not appear, nor by whom or for what purpose placed there. The custom, as shown by the evidence in the case, for the occupants of these lots to occupy and cultivate the whole of the street on the north of each lot, may indicate an explanation of the situation of this fence. Before 1832, this fence was changed to a line immediately north of Seventy-eighth street; but, if we consider the line referred to in Woodward memorial, as the same line in existence in 1822, this fence did not exist in 1836, when Miller took possession of the premises between Seventy-eighth and Seventy-ninth streets, Fourth and Fifth avenues, as Wooley's tenants.

It is true that Wooley did mortgage down to this line, but the mortgage to Joshua Jones was made by him when his petition for a reformation of the lines about his property was before the common council; and his pointing out to Miller this line as his southern boundary was also done while his petition was before the common council, or about the time it was presented; for Miller went into possession about 1836, and Wooley's petition was laid before the common council on the 26th of that month. As he was to lease the land to Miller, it might well be that he only desired to indicate to him the property, bounded as it would be if his petition was favorably acted upon; and his statement that the land below belonged to the corporation, may well be explained as a mere statement to Miller, informing him who was situated next to the land he was to occupy. I could not find from the testimony that this northerly line of Seventy-eighth street

was ever acquiesced in by the parties in interest as the boundary line between lots 140 and 143. Wooley attempted to have it established as his southern boundary line, but failed in the attempt, the evidence not showing that he ever assented to the defendants' proposition in this regard.

Even if Wooley did understand that this line was his southern boundary, it not appearing that it was originally established as a boundary line, Wooley's acquiescence, if any, did not continue for a sufficient length of time to bar a right of entry; for he came into possession in 1834, and deeded to Miner in 1842. I do not find evidence of any acquiescence in this line, by Wooley's grantors.

The next line upon the southern boundary of lot 143, was the fence erected in June, 1841, by Williams, who was in the employment of Allerton, who was the tenant of the defendants, and in possession of lot 140. This fence was erected to keep out cattle from the inclosure occupied by Miller, on the north. It was not upon the line formerly pointed out by Wooley to Miller. There is no proof of any acquiescence of any one on behalf of the owner of lot 143 in its erection or continuance, and it only existed until 1856, when, in grading Seventy-eighth street, it disappeared.

Here were four, or, if we consider the line upon Ludlum's survey and the line referred to in Woodward's memorial as the same line, we have three different lines, no one of which, in my opinion, has the requisites necessary to establish it as the boundary line between lots 140 and 143, by practical location.

No one of these lines appears to have been erected as a boundary line, although I do not think this to be necessary to establish a boundary by practical location (Dunham *v.* Stuyvesant, 11 *Johns.* 569; Jones *v.* Smith, 64 *N. Y.* 180).

I do not think it necessary, that where there is no

agreement between the parties as to the boundary line, and a division line has been actually in existence, the fact of acquiescence in this line *as a boundary line*, by the parties in interest, for not less than twenty years, must be found to establish the division line as a boundary line by practical location; and I can find no such fact as to any of the lines mentioned, from the evidence in this case.

It is true that all of these lines included the premises in dispute, and would exclude them from lot 143; and this would prove an important fact, if the defendants could show an occupancy of the premises excluded by these lines from lot 143, for a sufficiently long space of time to bar a right of entry. In such case it might be claimed that the greater included the less, but this principle has no application to the practical location of a line.

I should not find that these lines were placed where they were under the intent of the parties to place them on the northerly line of Seventy-eighth street, as laid down on the Goerck map, and even if such were their intent, it is not the intent of the parties, but the actual location, which establishes the line. The intent of the parties to erect their fences upon a line capable of ascertainment, might, in certain cases, be of importance in ascertaining the construction to be put upon the deeds under which they held; but I do not understand that a line can be practically located by an intention in the minds of the parties to locate it in a certain place, when, in fact, they locate it somewhere else. It is the fact of the location, and not the intent of the parties, which must govern.

Under the evidence no estoppel *in pais* is established against Miner. Independent of the difficulty of holding that a mere payment of taxes and assessments upon land by one claiming title thereto, would preclude the true owner from asserting his title, even if he

knew of such payments at the time they were made, there is no evidence that Miner knew anything about these payments made by the defendants. All the elements necessary to establish an estoppel *in pais* are wanting in this case.

I am, therefore, of the opinion that, on July 7, 1866, Russell D. Miner was the owner, and entitled to the possession, of the property in question.

On July 7, 1866, Russell D. Miner executed a conveyance to the defendants, whereby, for the sum of $25, he granted, bargained, sold, aliened, remised, released, conveyed and confirmed to the defendants—

"All the northerly half of an old street lying between the lots number 140 and 143, on the map of the common lands of the city of New York. Bounded northerly by said lot number 143, southerly by the center line of said old road, easterly by the east road, and westerly by the middle road, as laid down on said map."

This deed conveyed to the defendants the premises in dispute, and the question must now be determined whether Miner was induced to execute and deliver this deed through the fraud or fraudulent procurement of the defendants.

On May 21, 1866, the defendants sold at auction a number of lots situated upon the south side of Seventy-eighth street, and between Fourth and Fifth avenues. Within the area so sold, was embraced the strip of land in controversy in this case.

A Mr. Sternberger purchased at that sale lot number 5, as shown on map. Mr. Sternberger employed Messrs. J. H. and S. Riker, counselors at law, to examine the title to the property so purchased by him. They found that by the deeds on record the title to the southerly half of Seventy-eighth street, as laid down on the Goerck map, was in Russell D. Miner as former owner of lot 143. This was a cloud upon the title pro-

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posed to be conveyed to their client by the defendants. They communicated the fact to the then mayor of the defendants, John T. Hoffman, and were requested by him to make a thorough examination of the title to the strip of land in question. They did so. They examined the records in the register's office. They investigated the acts of Miner and his grantors in and about lot 143; they unearthed and examined nearly all the documents which have been put in evidence in this case, except the petition of John Woodward, and the report thereupon; they investigated the facts in regard to the boundaries made about lot 143, and the occupation within those boundaries. They reported to Mayor Hoffman that the paper title to this strip of land in dispute was in Russell D. Miner, but that Wooley, Miner's grantor, had occupied and had the benefit of a strip of land on the north of lot 143, the legal title to which was in the city of New York, and that it was fair and equitable to ask Miner for a release of this strip on the south of lot 143. The mayor authorized them to obtain such release.

So far no communication had been had with Miner.

On the morning of July 7, 1866, Mr. John H. Riker called upon Russell D. Miner, who was a clerk in a grocery store, at the corner of Watts and Varick streets, in this city, and had a conversation with him, relative to giving a release to the defendants of the strip of land in controversy.

The account of the interviews on this subject, as given by Mr. Riker and Mr. Miner, do not differ more than is to be expected in cases of this character. Mr. Riker says he was at the store corner of Watts and Varick streets twice on July 7, 1866; while Mr. Miner says he saw Mr. Riker but once on that day, but that a day or so before two gentlemen were in, and they called for cider, and in the conversation mentioned Recorder Riker, and Miner said that he knew him, and

asked whether either of the gentlemen was Recorder Riker's son, and the reply was "no," either "nephew" or "cousin." Thus it seems that Miner remembered two occasions, near July 7, 1866, when a Mr. Riker was in the store, and I have no doubt but that these two occasions are those testified to by John H. Riker.

Nor have I any doubt that the statement made by John H Riker, as to what took place between him and Miner on July 7, 1866, is true. I think that his statement is much more likely to be strictly accurate than Miner's statement, and it must be noticed that in some very important points they agree. Miner says that Riker told him that the city of New York had been selling or was about selling land, and that it was necessary for them to have his (Miner's) signature, in order to enable them to give a good title; and that the matter was in relation to some land conveyed to him by Mr. Wooley; that the object in obtaining Miner's signature was to enable the city to give a warranty deed; and, in the complaint, Miner states that he was informed that he had some claim to the property in question, but that it was a mere equitable claim and of no value. I think the statements made by Mr. Riker are the substantial truth in the case; that there were two interviews, I have no doubt. It would be very unusual for any one to prepare a deed or release without knowing whether it would be executed or not, and then, the first time the parties met, abruptly put forward the release and ask for a signature. The more natural way would be to do what was done in this case—discover whether the release would be executed, and then prepare it and apply for a signature.

In the conversation between John H. Riker and Miner, Miner said that Wooley was his brother-in-law, and that he (Miner) at one time owned some land in the vicinity of Seventy-eighth and Seventy ninth

streets. Mr. Riker then told him that the city had been making a large sale of lots between Fourth and Fifth avenues, and that his firm had been employed to examine the title to one of these lots; that they had found that a part of the land on the south side of Seventy-eighth street, between Fourth and Fifth avenues, was included in an old street between lots 140 and 143 of the common lands; that it appeared by the record that Mr. Wooley and he (Miner) had owned lot 143; that they (Messrs. Riker) considered that his (Miner's) title extended to the middle of the old street. Mr. Miner said that he claimed no interest in land in that vicinity; that that was settled long ago. Mr. Riker then told him of an adjustment which Mr. Wooley had made with the corporation, by which Mr. Wooley had taken the strip to the north of lot 143; that no deed could be found in the register's office from him (Miner) or Wooley, carrying out Wooley's part of the bargain, and asked Miner if he would release to the corporation the land on the south side of Seventy-eighth street, included in the old street, between lots 140 and 143, and Miner said he would; Mr. Riker then told Miner that he did not want the release for himself, but for the city, and asked Miner if he would execute a release to the city if he (Riker) prepared one, and Miner said he would. Mr. Riker then went to his office, where a deed or release was prepared, and, between two and three o'clock of the same day, went back to the store where Mr. Miner was, told him that he had brought the release, filled in the blanks in Miner's presence, read over the instrument to Miner down to the habendum clause. Miner signed it. It was witnessed by Mr. Riker, and recorded the same afternoon. The instrument was dated June 7, 1866. The firm of J. H. and S. Riker charged to and received from the defendants, for their services in examining the title and procuring this release, $1,000. They fur-

nished to the city an abstract in which it was stated that the Wooley mortgages did not affect the property in question.

The fraud claimed in this case is fraud upon the part of John H. Riker, in procuring this deed or release from Mr. Miner. Although very many authorities have been cited upon the argument, the question of actual fraud and fraudulent intent is purely one of fact, and very little aid can be derived upon this point from decided cases. In this case I only know John H. Riker from the record. By that his conduct must be judged. Of course, a referee has a right to consider the appearance of the witnesses: but, upon the record alone, the general conviction forced upon my mind, from the whole case, is that the conduct of John H. Riker in this transaction was perfectly honorable and straightforward, and in every way consistent with the highest integrity.

It will not do to examine this question of fraud in the light of the present knowledge of those who have been for a long time actively interested in this case. We must place ourselves, as far as we can, in Mr. Riker's position in 1866, when the questions in this case were new, and determine, if possible, how, then, they would strike the mind. We all know how principles of law, by careful study and laborious application, become so clear to our minds that we wonder how we ever could have been in doubt, and it is not at all surprising if Mr. Riker's opinion upon the legal questions involved in this case was somewhat different from what, by very acute analysis and most laborious investigation, has so far been decided to be the law in this case, without any absolute certainty that the correct law has yet been laid down.

Wooley had apparently acted upon the report of the common council made upon his petition. Judge INGRAHAM, his counsel, thought Wooley had actually

executed a release to the city of the land to the south of lot 143, comprised in Seventy-eighth street, as laid down on the Goerck map; and without going into nice questions of law, it would naturally seem just and fair that if Miner's grantors had occupied and had the substantial ownership of property equally valuable, to the north of lot 143, which belonged to the city, that Miner should release to the city this strip on the south. I do not say that these were the actual facts, but I do say they must be considered as actual facts in examining this question of fraud, for Riker believed them to be so. It is especially to be noticed that on the first trial the court considered the facts upon which Mr. John H. Riker acted to be conclusively proved, and that substantially, upon the evidence before Mr. Riker in 1866, and the law was applied as Mr. Riker understood it in 1866.

Nor does a minute examination of the evidence in detail and of all the separate parts of it which the plaintiff's counsel claims establish fraud on Riker's part, and consequently on the part of the defendants, enable me to discover any such fraud.

The contrast between the parties to the transaction —on the one hand, the powerful city of New York, on the other, an obscure clerk in a modest grocery store— is sufficiently striking, but I do not see how this difference in the position of the parties is of any importance unless the power of the stronger was improperly exerted upon the weaker. Nor does the small amount of time consumed in obtaining the conveyance amount to anything, unless Miner was induced by Mr. Riker to act hastily and improvidently, and I cannot see that there is evidence warranting such a finding. The annotations upon the abstract as to the effect of the mortgages made by Wooley are in every way consistent with the statement that Mr. Riker regarded these mortgages as having a very important bearing upon Miner's

title to the property in question, not as covering the property, but as indicating that Mr. Wooley made no claim to land on the south of the northerly line of Seventy-eighth street as laid down on the Goerck map, and therefore strengthening Mr. Riker's theory that Wooley had abandoned such land and taken the strip on the north of lot 143. The dating of the deed June 7, 1866, when in fact it was executed one month later, can have no possible bearing upon any question of intent to defraud Miner. The taking the description in Miner's release from the deed from the city to David Wagstaff, in 1801, was the most natural and proper thing to do, when by this deed the record title to the property in dispute had passed from the city. The failure to annex a map of the property to the release is accounted for by the fact that the Messrs. Riker were ignorant that there was an ordinance requiring anything of the kind to be done, while the charge to the city of $1,000, for the services of the Messrs. Riker, was, in my opinion, a very small charge, considering the complications of the case. It seems to me difficult to seriously press this point as a badge of fraud to any one who is familiar with the complications and difficult questions of law involved in this title.

I must find in this case that there was no actual fraud, or intent to deceive Miner on the part of any of the agents of the defendants connected with this transaction.

This, in my opinion, determines this case, for although, where there has been a trial, either party may have any relief "consistent with the case made by the complaint and embraced within the issue," where the *gravamen* of the action is fraud, the fraud must be proved to entitle the plaintiff to any judgment whatever. In my judgment this complaint presents a clear case of a common law action for deceit, and if this be so the action cannot be maintained without proving

actual fraud. If actual fraud—and this would necessarily include an intent to deceive—be proved, then I think the plaintiff could have any judgment, legal or equitable, to which the other facts as proved might entitle her. But, in an action founded on fraud, in which allegations of fraud go to the very foundations of the action, and are not simply attached as incidents to the cause of action, I think no judgment would be consistent with the case made by the complaint and embraced within the issue which did not depend upon fraud as a substantive fact.

But the plaintiff earnestly insists that she is entitled to an equitable judgment declaring that the defendants are trustees for the plaintiff to the amount of the money actually received by them for the property in question, with a provision for an accounting relative to this fund, even though no actual fraud is proved in this case on the part of the defendants. I do not think such a judgment possible under this complaint; but I will briefly examine the grounds upon which this claim for equitable relief is based, as stated by the counsel for the plaintiff.

1. As to the difference in general information between the parties:

The case will be examined in vain, I think, for any evidence showing that Miner was not, on July 7, 1866, entirely capable of transacting business, and indeed, some years later, upon the first trial of this case, he appeared to be of fully average strength of mind and intelligence.

"If a person of ordinary understanding, on whom no fraud has been practiced, makes an improvident bargain, no court of justice can release him from it" (Blackford *v.* Christian, 1 *Knapp*, 77).

2. As to the difference in the special information of the parties relative to the subject-matter of the controversy:

Such difference can have no bearing, except with reference to some concealment of fact, and I find that Miner was really informed of all the main facts which were in the possession of John H. Riker.

Nor is such difference in special information material in this case, for there were no relations of confidence here between the defendants or their agents, and Miner and Riker were permitted, under the rules of either law or equity, to "be silent and be safe."

3. As to the haste or surprise with which it is claimed this transaction was accomplished:

The word surprise seems to be used in equity in two distinct significations—one to support a bill filed on the ground of *mistake*. With this meaning of the word we have nothing to do in this case, for, unless I misapprehend this case, no action can be here maintained based solely upon mistake, unaccompanied by any fraud or circumvention.

The other use of the word surprise would seem to include within itself fraud or circumvention, and I cannot find any trace of fraud or circumvention in this transaction. There was no management or influence to mislead Miner, there was no pressure brought to bear upon him to cause him to act without due deliberation. If he was willing to sign the deed or release upon the asking, I see no obligation or necessity of any kind resting upon the defendants or their agents to cause him to wait and deliberate. At least they ought not to be found guilty of fraud, actual or constructive, if they fail to do so.

4. Inadequacy of consideration:

As the case stands, there was gross inadequacy of consideration for this transfer to Miner. So far as this bears upon the question of actual fraud, it has already been considered. So far as this bears upon the question of equitable relief and constructive fraud,

I regard it as standing alone; and inadequacy of consideration, standing by itself, does not constitute a ground to avoid a bargain or a distinct principle of relief in equity.

Under the evidence the plaintiff is the sole party in interest and entitled to maintain this action.

It follows that judgment must be rendered for the defendants.

Judgment having been entered on the report of the referee in defendants' favor, plaintiff appealed therefrom to the general term.

J. Mitchell Tyng, attorney, and of counsel, for appellant.

Jameson & Mahan, and *William C. Whitney*, corporation counsel, attorney; *William C. Whitney*, corporation counsel; *Francis Lynde Stetson*, of counsel, for respondent.*

BY THE COURT.—FREEDMAN, J.—After a careful examination of the whole case I have arrived at the conclusion that no error was committed by the learned referee. His rulings upon questions of evidence were clearly right; the facts found by him are not only supported, but they were called for, by the proofs; and his conclusions of law flow from the facts as found. The plaintiff failed to establish the existence of the elements essential to the maintenance of an action for either actual or constructive fraud, unless gross inadequacy of consideration of itself is sufficient to sustain it. But according to well established principles this is not enough.

* The briefs of the counsel are very elaborate, and their length prevents their insertion in full, nor can they be condensed so as to present them in the manner which their merit entitles them to.

Statement of the Case.

For the reasons assigned by the referee in his opinion, which seems to have been well considered and is quite exhaustive, the judgment appealed from should be affirmed, with costs.

CURTIS, Ch. J., and SEDGWICK, J., concurred.

BENJAMIN WESTERVELT, AS ADMINISTRATOR, &c., PLAINTIFF, *v.* MARY WESTERVELT, DEFENDANT.

Mistrial—what constitutes—Surrogate—effect of order of under chapter 394, *Laws* 1870—*jurisdiction of—Res adjudicata.*

In this case the judge upon the trial, after the parties had rested, stated that if the plaintiff would stipulate to make and print a case for the general term, and that, in case of his failure there to maintain his verdict, a verdict should be entered for defendant, he would direct a verdict for the plaintiff, and order the exceptions to be heard in the first instance at general term. The required stipulation being given, a verdict was thereupon, by consent of counsel for both parties, directed for the plaintiff, and the exceptions ordered to be heard in the first instance at general term.

Held, that in the absence of an exception to the direction of a verdict, defendant can have no relief from the general term, other than a new trial, upon the ground that there was a mistrial; that the foregoing arrangement was a confounding of the two remedies by which the proceedings upon a jury trial can be reviewed in the first instance at general term, before judgment.

The action was brought by plaintiff as administrator, to recover certain moneys deposited in a savings bank in the name of defendant as trustee, for plaintiff's intestate.

Held, that an order of the surrogate, under chapter 394, *Laws* 1870, deciding that said administrator, by virtue of his office as such, was entitled to the custody of the bank-book, was not an adjudication of his title to the funds represented thereby;* *also held*, that the

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* In the Matter of the estate of Mary Ann Beebe (20 *Hun*, 462), it was held by the Supreme Court, Third Department, that chapter 394, *Laws* 1880, is unconstitutional.

Opinion of the Court, by FREEDMAN, J.

surrogate had no jurisdiction to try such a claim, and that the defect was not waived by the appearance of the parties.

What constitutes *res adjudicata*, and how a party may avail himself thereof; also jurisdiction of surrogate, when must be shown and how,—considered by the court.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided June 18, 1880.

Exceptions ordered to be heard at general term in the first instance.

The facts are fully stated in the opinion.

Robert N. Waite, for plaintiff.

H. M. Collyer, attorney, and *Thomas B. Odell*, of counsel, for defendant.

BY THE COURT.—FREEDMAN, J.—The action was brought by the plaintiff as administrator of the goods and chattels of Sarah Van Zandt, deceased, against the defendant, a sister of the deceased, for the conversion of certain moneys alleged to belong to the deceased at the time of her death. The defendant defended on the ground, and upon the trial showed, that the said moneys were deposited by the deceased and the defendant in the Union Dime Savings Bank, pursuant to an agreement between them that the account should be a mutual affair and should be in such form that, in case of the death of either, the survivor should take the whole; that to carry the said agreement into effect, and pursuant to the advice of the treasurer of the bank that it was sufficient for their purposes, the account was opened in the name of the defendant in trust for Sarah Van Zandt, the latter being then quite feeble; that the account continued in this way from October 17, 1863, to September 14, 1876, when the money then on deposit, with the interest accumulated thereon, was

withdrawn by the defendant in accordance with the above agreement. The defendant further proved that just before, and in expectation of her death, which occurred on November 7, 1869, Sarah Van Zandt delivered to her, the defendant, the sum of $300, and directed her to deposit it in the bank with the rest of the money, and at the same time said that it was all for her, the defendant.

The learned judge below was of the opinion that upon the merits, as disclosed by the facts, the defendant was entitled to a verdict; but being in doubt as to the legal effect of a certain order make by the surrogate on June 10, 1871, he suggested that, if the plaintiff would stipulate to make and print a case for the general term, and that, in case of his failure there to maintain his verdict, a verdict should be entered for the defendant, he would direct a verdict for the plaintiff and direct the exceptions to be heard at general term in the first instance. Plaintiff gave the required stipulation, and a verdict was thereupon, by consent of counsel for both parties, directed for the plaintiff, and the exceptions were ordered to be heard at the general term in the first instance. It does not appear what exceptions were thus ordered to be heard at general term, and the case contains the exceptions taken by both sides. But assuming that the intention was to order defendant's exceptions to be thus heard, a difficulty arises from the omission of the defendant to except to the direction of the verdict. In the absence of such an exception, I do not see how the defendant can have any relief beyond a new trial, on the ground that there has been a mistrial, for the appellate jurisdiction of the general term depends exclusively upon the statute.

The proceedings upon a trial before a court and jury can be reviewed by the general term in the first instance, *before* judgment. (1) Where the unsuccess-

ful party desires to move for a new trial upon exceptions taken by him upon the trial, and the judge directs that such motion upon said exceptions be heard in the first instance at general term, and that the entry of judgment be suspended until the decision of the general term; and (2) where, upon the trial, an uncontroverted state of facts is presented involving only questions of law, without exceptions on either side to the reception or rejection of evidence, and the judge directs a verdict subject to the opinion of the court at general term.

In the first case, no question of fact can be discussed, nor the point raised that the verdict of the jury is against the weight of evidence; and if the exceptions are sustained, the general term will grant a new trial; if overruled, render final judgment.

In the second case the verdict, in form, may be directed in favor of one party or the other, and it is quite immaterial which; the only effect of directing the verdict in favor of a party being that it devolves on him the duty of preparing the case upon which the general term is to render final judgment. Application for judgment must then be made at general term, and upon such application the question to be decided is never whether a new trial shall be granted, but which party, upon the conceded state of facts, shall have final judgment.

Such was the established practice before the Code of Civil Procedure (Mason *v.* Breslin, 2 *Sweeny*, 386), and a confounding of the two remedies was always held to be a mistrial and ground for a new trial (Cobb *v.* Cornish, 16 *N. Y.* 602; Gilbert *v.* Beach, 16 *Id.* 606; Purchase *v.* Matteson, 25 *Id.* 211; Purchase *v.* N. Y. Exchange Bank, 10 *Bosw.* 564).

The Code of Civil Procedure has not changed the practice in the cases stated, though section 1003 extends it so as to embrace a case in which one or more

specific questions of fact, arising upon the issues in an action triable by the court, have been tried by jury.

Section 1000 is emphatic that exceptions can be ordered to be heard at the general term in the first instance only, upon the application of a party who has *taken* one or more exceptions upon a trial by jury.

Section 1185 is equally emphatic that a verdict subject to the opinion of the court can be directed only in a case which presents nothing but questions of law, in which case the motion for final judgment may be made by either party at the general term under section 1234.

A new trial must therefore be ordered, unless it is clear that the order of the surrogate was properly admitted in evidence, and that it constitutes a conclusive adjudication of the present controversy.

There can be no doubt that if the points now at issue had been involved in the proceeding before the surrogate and the surrogate had jurisdiction to decide them, the order would constitute a conclusive adjudication in favor of plaintiff's right of recovery (Wood *v.* Jackson, 8 *Wend.* 9; Gardner *v.* Buckbee, 3 *Cow.* 120; Merserean *v.* Pearsall, 19 *N. Y.* 108; De Wolf *v.* Crandall, 34 *Super. Ct.* 14; Hudson *v.* Smith, 39 *Id.* 452; Clemens *v.* Clemens, 37 *N. Y.* 59, per DAVIS, Ch. J.; Hyatt v. Bates, 35 *Barb.* 308; Davis *v.* Talcot, 12 *N. Y.* 184).

In such case it would be no answer to say that the adjudication was not made in a regular action, but in a special proceeding (Brown *v.* The Mayor, &c., 5 *Daly*, 481; affi'd 66 *N. Y.* 385; White *v.* Coatsworth, 6 *Id.* 137; Kelsey *v.* Ward, 38 *Id.* 83; Yonkers & N. Y. Fire Ins. Co. *v.* Bishop, 1 *Daly*, 449). Even when made by an order on a motion, an adjudication may in some cases be conclusive (Demarest *v.* Daig, 11 *Abb. Pr.* 9).

Nor is it necessary to plead an adjudication relied upon as an estoppel. The reason for always admitting

it in evidence is, that the community have an interest in holding the parties conclusively bound by the result of their litigation (1 *Greenl. Ev.* §§ 531, 531 a; Wood *v.* Jackson, 8 *Wend.* 9; Calkins *v.* Allerton, 3 *Barb.* 171; Castle *v.* Noyes, 14 *N. Y.* 329; Derby *v.* Hartman, 3 *Daly*, 458; White *v.* Coatsworth, 2 *Seld.* 137).

But a surrogate's court is only a court of limited and special jurisdiction, and a party (other than a ministerial officer) relying on its orders or decrees, has the burden of proving the jurisdictional facts (Roderigas *v.* East River Savings Inst., 43 *Super. Ct.* 217; affi'd 76 *N. Y.* 316).

The order relied on by the plaintiff seems to have been made under chapter 394 of the Laws of 1870.* It does not refer to the subject-matter of this action. It does not mention a purport to cover the money in dispute. It only refers to the bank-book, and without adjudging that, as matter of fact, the book belongs to the estate of Sarah Van Zandt, deceased, it simply

* The order referred to is as follows:

"On reading and filing the petition of Benjamin Westervelt, administrator, &c., of Sarah Van Zandt, deceased, alleging that he has reasons for suspecting that certain persons therein named have in their possession assets belonging to the estate of said deceased, and praying for the issuing of a subpœna to them, requiring them to appear and be examined concerning the effects of said Sarah Van Zandt, deceased, and on filing also said subpœna, with proof of service thereof, and the testimony of the witnesses taken therein, and after hearing, &c., for said administrator, and &c., for Miss Mary Westervelt, a sister of said deceased.

"It is ordered, adjudged and decreed that said Benjamin Westervelt, administrator of the goods, chattels and credits of Sarah Van Zandt, deceased, is entitled to the possession of the bank-book No. 12,888 of the Union Dime Savings Bank of the city of New York, by virtue of his office as such administrator of the goods, &c., of said Sarah Van Zandt, deceased, and that said administrator is entitled to a warrant, directed to the sheriff of New York county, commanding him to search for and seize said bank book No. 12,888, and to deliver it to said Benjamin Westervelt as such administrator."

adjudges that the plaintiff as administrator of said estate is entitled to its possession by virtue of his office as such administrator. This finding is insufficient under the decision of Tilton *v.* Ormsby (10 *Hun*, 7; affirmed 70 *N. Y.* 609).

Moreover, a certified copy of the said order was received in evidence, unaccompanied by any proof showing that the surrogate had acquired jurisdiction to make the order, except such as was furnished by certain recitals contained therein, if they did constitute proof upon the said point. Under the decision of the People *ex rel.* Emanuel Meyer *v.* Hartman (2 *Sweeny*, 576), it would seem that such recitals were not enough. But even if this be otherwise, it is sufficient to say, for the present disposition of the case, that such recitals, at most, can only be *prima facie* evidence of the facts recited, but are not conclusive, and that even as such, they simply show jurisdiction to make an order under chapter 394 of the *Laws of* 1870. This would still leave undetermined the jurisdiction of the surrogate to make a final adjudication upon a mere motion as to the title to, or the equitable ownership of, the moneys.

In Stilwell *v.* Carpenter (2 *Abb. New Cas.* 238), it was held that a surrogate cannot try a disputed claim of a third person against the estate, nor determine the equitable ownership of a judgment sought to be used as a set-off. And in Callahan *v.* Mayor, &c., of New York (66 *N. Y.* 656), it was held, that want of jurisdiction of the subject-matter is not waived by appearance and answer.

In no aspect, therefore, can the bare order of the surrogate be taken as a final and conclusive adjudication by a court of competent jurisdiction as to the title to, or the equitable ownership of, the money in dispute in this action.

This being so, and no question of fact being review-

Statement of the Case.

able in the present imperfect condition of the case, the verdict should be set aside, and a new trial ordered, with costs to the party finally prevailing in the action.

CURTIS, Ch. J., concurred.

THE TRUSTEES OF COLUMBIA COLLEGE, RESPONDENTS, *v.* THOMAS THACHER, IMPLEADED, &c., APPELLANT.

Covenant restricting the use of real property to certain purposes.

Where lands are taken subject to a covenant made between a former owner thereof and the owner of adjacent property, which covenant forbids the use of the premises for "any kind of manufactory, trade or business whatsoever," a change in the character of the neighborhood, *e. g.*, such as that produced by the erection of an elevated railway, which impairs the use of the premises in question for the purposes contemplated by the covenant, but does not affect the remainder of the property bound thereby, does not modify or impair the obligation imposed by the covenant upon the owner of said premises.

The language of said covenant precludes the carrying on of every kind of business, even though it may be relatively unobjectionable; *e. g.*, the business of a real estate agent.

The covenant will not be relaxed in favor of one front of the premises, upon the ground that the street which that side of the lot faces partakes of a business character.

Before CURTIS, Ch. J., and SEDGWICK, J.

Decided June 18, 1880.

Appeal from a judgment enjoining and restraining the defendants from permitting any kind of trade or business whatsoever to be carried on in the building on the northeasterly corner of Fiftieth street and Sixth avenue.

Statement of the Case.

There was a former trial, on which judgment was rendered in favor of defendant; an affirmance by the general term of this court (39 *Super. Ct.* 372); and a reversal by the court of appeals.*

The action was brought to enforce the provisions of a covenant contained in an agreement, dated July 25, 1859, from the plaintiffs to one Joseph Beers, forbidding the use of the said premises for business purposes.

The defendant, Lynch, acquired title to the lot on the corner of Fiftieth street and Sixth avenue, by sundry mesne conveyances from Beers, each of which expressed that it was made subject to this agreement.

The defendant, Thacher, became the owner of the said lot during the pendency of this suit, with notice of the agreement and of the suit, and he was made a defendant of record upon his own application, by order of the court.

The following questions were presented on the new trial: 1. Should the covenant, in view of the change in the character of the neighborhood, be enforced by a court of equity? 2. Should the said covenant be enforced as to the Sixth avenue front of the said premises? 3. Do the words "any trade or business, whatsoever" in the said covenant, embrace or apply to the business charged in the complaint to have been carried on in the basement of said house at the time of the commencement of the action, viz: the business of real estate agent, &c.

The judge before whom the case was tried filed his

* The decision of the court of appeals, reported in 70 *N. Y.* 440, disposes of the issues in the case as they originally stood, establishing that the agreement between the plaintiffs and Beers imposed a perpetual restriction upon the land, enforceable in equity against subsequent grantees, with notice of the agreement; and that such agreement was not void as in restraint of trade, or as imposing undue restrictions upon the use of property.

opinion rendering judgment in favor of the plaintiffs, as follows:

FREEDMAN, J.—In respect to the rights of the parties as they stood at the time the suit was brought, the evidence leaves the case precisely as it was left on the first trial. There is no evidence of any change whatever of rights on the part of the plaintiffs, nor has any evidence been adduced of any such changed condition of the neighborhood at that time, as would justify an obliteration of the covenant.

Under this state of evidence, the plaintiffs, under the decision of the court of appeals, are entitled to judgment for the relief demanded.

In respect to the additional points now claimed to have been raised for the first time, it seems to me—1. That the covenant in question restricts the use of the premises on the Sixth avenue front in precisely the manner and to the same extent as it restricts their use on the street; the covenant being that no trade or business whatsoever should be carried on, or permitted to be carried on in any manner or any part of the land covered by it, and there being no reservation in favor of the Sixth avenue front; and, 2. That the words "any trade or business whatsoever" embrace the different businesses shown by the evidence to be carried on upon a portion of the premises.

Upon the last point, force and effect should be given to the testimony showing the use of the premises down to the time of the trial, because the defendant, Thomas Thacher, who purchased *pendente lite* and assumed the litigation, was not compelled to rest his case as it stood at the time of the commencement of the action, but was allowed to avail himself of the present condition of affairs.

The only remaining question relates to the effect to be given to the testimony showing how the construc-

tion and operation of the Metropolitan Elevated Railroad, since the making of the covenant, have effected the premises. That their market value, for the present at least, has been seriously impaired by such construction and operation, has been freely conceded; but whether such impairment will be permanent is uncertain.

Now, the erection and operation of said railroad do not impair the legal rights of third parties between themselves. They do not justify a vendee in throwing the property back upon the vendor. They do not justify a tenant in refusing to pay his rent.

They, therefore, cannot modify or impair the covenant under consideration, unless they involve such a change in the character of the whole neighborhood, as would affect the entire property bound by the covenant. If the proof showed such a change, a court of equity would decline to enforce the covenant; but the proof does not come up to this point.

Evidence of the serious impairment of the value or use of simply one, or even a few, out of many houses subject to the covenant, is not sufficient. The covenant is for the common benefit of all the owners of the land covered by it. There is nothing in the case which would justify me to hold it obsolete as to certain portions of the land, and in force as to others. And I cannot modify the covenant so as to leave it in force, but adapted to a new state of things; it must be enforced as the parties made it or not enforced at all, and consequently annulled. There is no middle course. I have already pointed out that the proof is insufficient to authorize an annulment; and the argument that the kinds of business at present carried on upon the premises are relatively unobjectionable, cannot have any weight. If the pecuniary interests of the present owner of the corner house would justify him, on account of the construction and operation of said

Opinion PER CURIAM.

railroad, to use or permit the use of the building for business purposes, he would be justified to use it or permit its use for any lawful business, no matter how obnoxious it may be to the residents of the street.

The case of the defendant, Thacher, may be a hard one, but he bought with his eyes open and voluntarily assumed the litigation ; hence, his case is like that of his predecessors in interest, as to whom ALLEN, J., in delivering the opinion of the court of appeals, said it would be unreasonable and unconscientious to hold them absolved from the covenant in equity, for the technical reasons assigned, that it did not run with the land so as to give an action at law.

The plaintiffs are entitled to judgment, with costs.

J. F. McIntyre and *A. J. Dittenhoefer*, for appellant.

G. D. & L. Harrison and *S. P. Nash*, for respondent.

PER CURIAM. — Judgment affirmed, with costs, upon the opinion delivered by FREEDMAN, J., at special term.

Statement of the Case.

HESTER SHERMAN AND OTHERS, APPELLANTS, *v.* THOMAS KANE AND WIFE, AND THE MAYOR, &c., OF THE CITY OF NEW YORK, RESPONDENTS.

I. *Real estate.*

1. ADVERSE POSSESSION.

(*a*) GRANTOR, IN FAVOR OF.

1. Adverse possession can commence and run in favor of a grantor, as to either the whole or a part of the granted premises.

1. *This, though he has never given the grantee possession.*

1. EVIDENCE TO ESTABLISH. It should show a clear, unequivocal and notorious disclaimer of the grantee's title.

1. In this case held such disclaim.

(*b*) CORPORATION, TITLE BY ADVERSE POSSESSION.

1. Has power to acquire such title *in protection* of an undoubted power to hold the lands in question.

(*c*) WARRANTY DEED, EFFECT OF AS ESTOPPEL.

1. Does not estop grantor from beginning an adverse possession, and acquiring thereby a title which will not accrue to the benefit of the grantee.

1. *Possession, effect of not giving.*

The above is the rule equally when possession is not given, as when it has been given and there has been a re-entry.

(*d*) IMPLICATION FROM ADVERSE POSSESSION, AND POLICY OF DOCTRINE OF.

1. It necessarily implies *that a title has been competently acquired* through one or another of the methods of transferring title recognized by law, and *which, if relied on* by a warrantor, who had not gained title by adverse possession, *would enure to the benefit of the covenantee.*

BUT

Where title by adverse possession is relied on, the POLICY OF LAW FORBIDS an examination of any particular claim from its conclusive presumptions that there has been some unquestionable claim.

Statement of the Case.

2. STREET OPENINGS IN THE CITY OF NEW YORK.

(*a*) LAND NOT REQUIRED FOR A STREET, EFFECT OF MAKING AND RECEIVING AWARD THEREFOR.

1. An award by commissioners for land not required for the street, but which is a part of a lot, a portion of which was required, and which the commissioners deem it expedient to include in their estimate and assessment, and the acceptance of such award *operate as a conveyance of the land* to, and vest the title in, the corporation of the city of New York.

II. PRESUMPTIONS AND ADMISSIONS.

(*a*) EVIDENCE.

1. *Cannot be relied on* (when they do not operate as an estoppel) to the exclusion of decisive evidence as to the matters to which they relate.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided June 18, 1880.

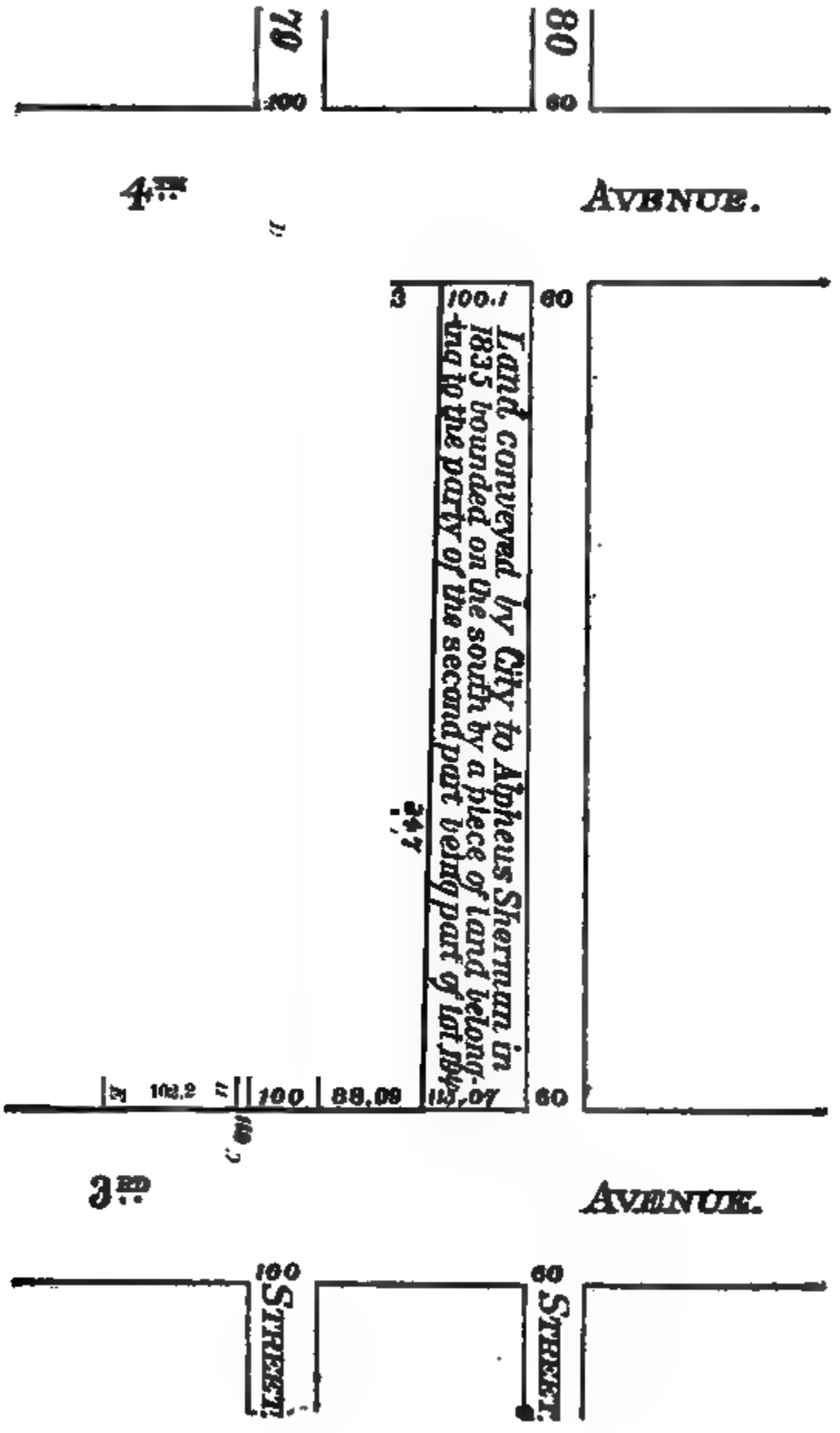
This is an action of ejectment to recover the possession of certain premises on the southwest corner of Seventy-ninth street and Third avenue.

The diagram on the next page will serve to apply the opinion of the court to the questions involved in the view taken of the facts by the court.

The line *D D*, intersecting the south side of Seventy-ninth street, is the southern line referred to in the opinion at page 321. This line is referred to in the testimony and points of counsel as line *D D*. The line *J K* represents the center line of the Old Post road as laid down on the old Goerck map. It intersects line *D D* at a point three hundred and forty-seven feet west of Third avenue.

The space confined within lines *E F*, *F G*, *G H*, and *H E*, is the *locus in quo*.

Plaintiffs claimed title through Alpheus Sherman, who claimed title through James Walker, who claimed under a warranty deed made to him in 1803, by the mayor, &c., of the city of New York, the description in which deed was as follows:


70
100
80
80
4TH AVENUE.
3
100.1
60
Land conveyed by City to Alpheus Sherman in 1835 bounded on the south by a piece of land belonging to the party of the second part
102.2
100
88.09
112.07
60
3RD AVENUE.
100 STREET
60 STREET

Statement of the Case.

"All that certain piece or lot of land, parcel of the common lands of the said party of the first part, situated in the seventh ward of the said city, and described in the survey and map or chart of the said common lands, filed in the office of clerk of the said city, by the number one hundred and ninety-four; bounded on the west end by a certain road laid out on the said map, called the east road; on the east end, by another road laid out on the said map, called the Post Road; on the north side, by a street of sixty feet in breadth, between the said lot hereby granted and released, and lot number one hundred and ninety-five; and on the south side by another street of the like breadth of sixty feet, between the said lot hereby granted and released, and lot number one hundred and ninety-three. Reference being had to the said map, will more fully and at large appear."

The lots are laid out on the map as containing in breadth at each end three chains and three links (200 feet), and in length on each side, thirteen chains and ninety-four links (920 feet), according to the English standard.

It, perhaps, is proper to mention, that according to the testimony of Mr. Ludlam, if measurements are taken from the intersection of the division line between the New York and Harlem commons, with the easterly side of the east road the center line of the old sixty-feet street, between lots 194 and 193, will intersect the east side of Fourth avenue, at a point one hundred and forty feet one inch south of the southerly line of Seventy-ninth street; while, if the measurements are taken from Forty-second street, it will intersect at a point one hundred feet two inches south of the southerly side of Seventy-ninth street.

He also says line *DD* was intended to show the northerly line of the old street between lots 193 and 194.

Statement of the Case.

The evidence shows that the actual possession by Walker, the original grantee from the city, and by all claiming under him, was confined to the land north line *DD*, while the city remained and continued in the actual possession of the land south of and up to line *DD*.

The cause was tried by the court without a jury. The learned judge before whom it was tried found in favor of the defendants, delivering the following opinion:

"SEDGWICK, J.—The learned counsel for defendants maintained, as one of the defenses, that the southern boundary of the lands conveyed by the corporation to Walker was, by the parties, practically located on the soil so as to exclude from lot No. 194, and include in the lands of the city, the whole of the premises in question.

"I am forced to think, that the mere fixing of the boundary alluded to would not have the result claimed.

"The deed did not describe the lot by measurements from monuments. It did not give any quantity. An inspection of the map referred to gives neither. The deed conveyed the lot No. 194 on the map, describing it as bounded on the north and on the south by two streets, respectively, of sixty feet in breadth, between the lot and other lots, numbered on the map. The fee conveyed went to the center of the streets, because they were boundaries, and the words of the deed did not specifically exclude the soil of the street. If we suppose, then, that the parties proceeded to lay the boundary on the south, that boundary must have been on the northern line of what, by the deed and the map, was deemed a street, and, by force of that fact, the street became the boundary, and, therefore, the owner of the lot owned one-half of the boundary or street. Merely

bounding actually on a street would follow the description of the deed. If the deed had described this line otherwise than by reference to the street, and if, in fact, that line were along a street, the fee would go to the center line of the street (Sizer *v.* Devereux, 16 *Barb.* 160; Hammond *v.* McLachlan, 1 *Sandf.* 323; Herring *v.* Fisher, *Id.* 344). It is well to say here, that the deficiency of land on the Goerck map as compared with the Randall map does not affect this case. The deed conveyed lot 194, and the evidence shows that that lot had a definite *situs*, which would not be changed by the error alluded to.

"I am, however, of opinion that, excepting the piece called the gore, the defendants have title by adverse possession, and that they have title to the gore by the equivalent of a voluntary conveyance from Alpheus Sherman.

"The claim of the plaintiffs rests upon the description of the deed referred to. Every other fact of the case (and the most important of these are acts in which the parties had mutual relations), testifies that the disputed land was owned by the city. There is no proof that, from 1803, Walker or his assigns made a claim to that land in any way.

"It is denied that adverse possession could be commenced, because the city, as grantor, never gave the grantee possession. The counsel for defendants urged, that the proof showed that the city had, in fact, given to the grantee, Walker, possession of the land in dispute. To support this, he points out that the city's deed to Walker describes the land as '*in his actual possession now being*,' and argues that this corresponds with the legal presumptions that the obligation of the grantor to give possession was performed, and that the usual and ordinary consequence of a grant followed. But presumptions and admissions, for it is

not claimed that there is an estoppel, cannot be relied on to the exclusion of decisive evidence as to the matters to which they relate. The fact was, as I think the evidence abundantly shows, that neither party thought of giving or taking possession of the land in dispute, because neither believed that the grantee was entitled to it. This did not flow from the idea that actual possession could not be had, inasmuch as the public were to have, forthwith, the actual use for the purpose of a highway. If this had been the fact, and the public were, or were forthwith to be, in use of the street, it would be a proper conclusion that the giving possession up to the street operated as to the street itself. But, under the deed, Walker remained in actual possession of land comprised between the northern lines of the two streets named as boundaries. If there were purpose to give possession between the center lines of these streets, there was nothing to prevent. If the right were recognized, Walker would not have been placed in possession of the whole of the north street. This giving possession, temporarily, as it turned out, to the whole of this street, was a part of a systemized plan, necessarily involved the exclusion of Walker from any occupation of the street to the south. I conclude, on this point, that the city never put Walker in actual possession of the *locus in quo*. For reasons of a like kind it should be held that neither Walker nor any of his assigns conveyed the piece back to the city. If Walker had been put in possession of the land in dispute, and had thereafter been ousted from it, or had conveyed it back and left it, the evidence is so full as to the actual occurrences, it is impossible to doubt that these facts would appear.

"It is urged that, as the grantor remained in possession after the conveyance, it became tenant at will of the grantee, and that, so long as it remained such, and before it delivered possession and re-entered under

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its own claim, it was disenabled from beginning adverse possession.

"It is evident, that, while the grantor may be such a tenant, he does not hold the ordinary relation of a tenant who takes a term from or agrees to pay rent to his grantee. Up to that point his rights are limited only by the obligation of his deed. He has done no act, like receiving possession from his landlord, which binds him to allegiance or fidelity. The grantor, remaining in possession, is not entitled to notice to quit before the grantee has the right to bring ejectment. Of such a tenant, Chief Justice THOMPSON, delivering the opinion in Jackson *v.* Aldrich (13 *Johns.* 106), said, 'There was certainly no relation of landlord and tenant created by any express agreement, and to presume such relation from the naked fact that the defendant continued in possession, would be carrying the doctrine of presumption beyond what, in my judgment, the rules of the law will go.'

"In another like case (Jackson *v.* Burton, 1 *Wend.* 341), the court approved Jackson *v.* Aldrich, and said it held, 'that, even as between Garrison (the grantor) and the defendant, the relation of landlord and tenant did not exist, so as to entitle him to notice to quit, and that he was at most but a tenant at will;' and the same case held, 'that nothing but a clear and unequivocal and notorious disclaimer of the title of the landlord could render such a tenant's possession, however long continued, adverse.'

"It could not be the force of the deed alone that would prevent the grantor in possession making an effective claim of adverse possession, if it be admitted that he could make such a claim after rendering possession, for that would not vary or diminish the force of the deed.

"If he were in the position of a person who had received the possession from another, other rules would

apply (Smith *v.* Babcock, 36 *N. Y.* 167, and the cases there cited; Burhans *v.* Van Zandt, 7 *Barb.* 91–100; Jackson *v.* Spear, 7 *Wend.* 401; Kane *v.* Bloodgood, 7 *Johns. Ch.* 90; Judge NELSON's opinion in Zeller *v.* Eckert, 4 *How. U. S.* 289); but, not having done that or an equivalent act, there is no reason of policy or in the nature of things, why a person, who has apparently executed a deed covering the premises, should not gain a title by adverse possession, which must last so long that the presumption from the passage of time will, in its conclusions against all the world, include the case of there being some sufficient reason why it would be impolitic or unjust to determine the validity of the reasons an apparent grantor might have for denying the deed. If the grantee brought ejectment at the time, the grantor might plead *non est factum*, or have the deed reformed in equity. And after the lapse of the statutory period the validity of the actual claim on which adverse possession begins, is never a question. In fact, it is often assumed to begin in a tort, and that before it there was an owner who was wronged, and the law refuses to ascertain the quality of the act.

"I find, as the facts of the case, that Walker was put in actual possession of so much of lot No. 194 as was north of the old street to the south. This fact implies that, when the deed of lot 194 was given, and no further thing was done, the city claimed all south of that north line as its own. Especially is this to be inferred from the fact that they put him in possession of all the street to the north. About twenty days after the deed was delivered to Walker, the city made its lease to Anthony Smith for the term of twenty years of lot 193, giving to him actual possession up to the line of the actual possession given to Walker.

"It may, perhaps, be said that these facts do not show that this claim that affected the northern part of lot 193 was of a fee, but that they show only that the

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claim was to hold that part subject to its being taken thereafter as a street, and was a claim to hold only temporarily until that street was opened.

"This is answered by the rule cited by counsel for defendants, 'that a subsequent act will explain a preceding entry' (Smith *v.* Burtis, 9 *Johns.* 174–182).

"The prior act may be characterized by the inference to be drawn from subsequent acts.

"The subsequent acts referred to in this case are those of the plaintiff's ancestor, Mr. Sherman. He remained in actual possession from the time when lot No. 194 was conveyed to him by Jane Ackerman, about 1820, until 1835, when he conveyed to Davis. During this time he was confronted by the possession of the city, through its tenants, of the land in dispute, and which the deed, as now construed, gave to him in fee.

"Proceedings for the opening of Seventy-ninth street, from Fifth avenue to the East river, were begun some time before June 14, 1827, because a report of the commissioners was filed on that day. To these proceedings Mr. Sherman was a party, and they, and the map connected with them, were notice to him so far as they affected his property. By the map it appeared that the city claimed that his land extended down so as to include, on the south, only the soil of which he had been in possession, and that it was the owner of the soil to the south of that possession.

"This was specific notice that it did not claim to hold the land in dispute temporarily, and until the sixty-feet street could be opened; for, necessarily, when Seventy-ninth street was opened, any idea of using soil of the sixty-feet street was abandoned.

"Mr. Sherman was an involuntary party to these proceedings, as far as they concerned the land taken for the street, and a voluntary party as to the gore that has been mentioned.

"Of the section of the statute under which that

gore was taken, it was said in Embury *v.* Conner (3 *N. Y.* 511), that taking the award for a piece similarly situated—and in the present case it was shown that Mr. Sherman took the award for the gore—was a consent to the proceedings. 'These proceedings being taken with the consent of the owners, and duly confirmed by the court, and the damages paid pursuant to the statute, operate as a conveyance of the land and vest the title in the corporation.' And the court had before said: 'But it is insisted, that as the enactment is only held to be void on the ground that it takes private property for private uses against the owners' consent, if the consent be given, all objection on the ground of unconstitutionality is removed.

"The decisions to which I have referred proceed upon that principle, and Mr. Justice BRONSON, in Taylor *v.* Porter, in terms conceded that the objection has no application when the owner consents. If we read the statute with a proviso that the owner consents, and I think we should, that consent removes all obstacles, and lets the statute in to operate the same as if it had in terms contained the condition.

"The transaction, as it affects the gore, was of a voluntary character. The offer on the part of the commissioners had for its terms the terms of the section 179: 'It shall be lawful for the commissioners * * * in all cases when part of any lot or lots shall be required for any of the aforesaid purposes, leaving a residue of such lot or lots * * belonging to the same owner or owners, or parties in interest to whom the said part thereof so required for such purpose shall belong, and they, the said commissioners, shall think it expedient and proper so to do, to include and comprise in their said estimate and assessments the whole or any part of such residue of such lot or lots * * along with the part of the same so required for the said purpose of the said intended

operation and improvement, in like manner as if the said residue or the part thereof so included * * was required, &c.'

"The report of the commissioners stated that a certain piece of land, owned by Sherman in fee, and which it is conceded, in this case, was part of the land possessed by Sherman as No. 194, was required for the opening, and proceeds to state that such piece 'is part only of a certain piece or parcel of land of, in and to the whole of which the said Alpheus Sherman is seized in fee, subject to the rent hereinafter mentioned, and that we, the said commissioners, do deem it expedient to include and comprise in this, our estimate and assessment, so much of the residue of the said piece or parcel of land so belonging in fee to the said Alpheus Sherman, as is next hereinafter immediately described, &c.' The piece was described as a triangular parcel of land, and the southernmost boundary was 'southeasterly along land now or lately belonging to the mayor, aldermen and commonalty of the city of New York.' The map of the proceedings made it clear beyond doubt, that the commissioners proposed to take all of the lot to the south on the Third avenue, and it was apparent that the city claimed to own absolutely the land up to the southern boundary of the gore. This southern line was but five hundred and ninety-one feet and six inches, but, if it were protracted in a straight line to the Fourth avenue, the whole would be the southern line of Sherman's actual possession.

"This southern line had given the course to a fence existing in 1810, and which continued to exist to 1821, when Mr. Ludlam surveyed the ground, according to the possession, and found this fence. Upon this survey the Doughty and Ludlam map was made. This map was admissible, as showing, in connection with Mr. Ludlam's oral evidence, what the possession was—but, beyond this, two leases, letting lot 195 on

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May 1, 1823, and lot No. 152 on March 15, 1824, brought the map specifically to his (Mr. Sherman's) attention. The commissioners' proceedings did not estop Mr. Sherman or his grantees from showing the true title to the land south of the gore. They, however, form admissions as to the possession and title, and are direct evidence of the fact of the city's claim and possession as owner in fee. The city had made the same claim by the Doughty and Ludlam map, and by the facts it perpetuated. One peculiarity of this map is that it applied the lines of possession with reference to the Goerck map and the monuments laid down soon after 1807 for the opening of Seventy-ninth and other like streets. Its assertions are made of facts as existing from the time of the Goerck map, which are brought to Mr. Sherman's knowledge, and in accordance with which he acts, as the facts already stated show, and as again clearly appears by the conveyance of the city to him in 1835, recorded on November 20 of that year.

"By that conveyance he takes from the city a piece of land, paying $1,848, which the description bounds on the south 'by a piece of land belonging to the said party of the second part (being a portion of a certain lot of the common lands formerly belonging to the said parties of the first part, and known as number 194).' On the east it was bounded by Third avenue one hundred and seventeen feet and seven inches, and on the west by the Fourth avenue one hundred feet and one inch. These eastern and western measurements included the old street to the north. The deed is evidence that the city claimed to own in fee the soil of the whole of the old street, and that Sherman recognized the claim, buying the land without protestation or reciting that it was in settlement of any disputed claims. The relation of this old street on the north to the lot

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was the same as that of the old street on the south. They would both pass by the same construction of the deed. The interests of the parties were of the same nature. What one would claim or yield on the north side would be claimed or yielded on the south side. At the least, at the time of opening Seventy-ninth street, in 1827, the city claimed to own the fee, and Sherman assented to it on the south, and the deed to him of 1835 proves that this was well considered, however mistaken. But in going back to the origin of the city's claim, the manner of depicting the streets on the Goerck map, shows, in connection with the possessions taken under it, that the city claim was from the first that they were in possession of the old street on the south as owners in fee. This is the root from which grew the subsequent admissions and acts of the owners of lot 194.

"This possession of the city was hostile, inasmuch as it was repugnant with the operation of the deed as conveying a fee of the streets, and none the less hostile that the grantees recognized the validity of the city's possession. The adverse claim was notorious, and was continuous for more than twenty years.

"It is argued on behalf of the plaintiffs the commutation of the quit-rent and the release of the city worked an estoppel, but there seems no reason to believe that the terms of their lease, or the fact of commutation, referred at all to lot 194, as affected by a claim to the land now in dispute.

"It is further argued that the city, in putting its tenant, Anthony Smith, into possession by a lease of lot No. 193, as it appeared on the map of common lands, did not make any other claim than would appear on the face of the lease and the map. I think this would be correct, if the city only made the lease, and the tenant went into possession of more land than

the lease called for; but, on the facts, I am of opinion that, outside of the lease, the city, as a fact, designated the land in dispute as a part of lot No. 193, and placed Anthony Smith in possession of it. This inference is drawn from the whole history of the case. The act and claim of the tenant were the city's act and claim, and continued, through its successive tenants, to 1852, when the tenant Willett ceased to occupy. It is to be noted that the lease under which the city's tenant, John Robinson, entered, referred specifically to No. 193 as it appeared on the map of the common lands made by Goerck in 1796, and resurveyed by Doughty & Ludlam in 1822. Although this lease may not have been recorded, the act of tenant in taking possession, up to the time of the possession under the grant of lot No. 194, was open to the world, indeed, in the very presence of Mr. Sherman, and was of unmistakable import; and there is no room for believing that the tenant made a claim for himself or otherwise than under and for his landlord.

"It is also denied that the city, as a corporation, with special powers conferred and limited by statute, had or has the power to acquire title to any lands not needed for corporate purposes, or has the faculty of appointing an agent to take adverse possession. I think it has the power to take adverse possession, but do not enlarge upon the abstract question of law involved in the proposition, for the reason that the view I have already expressed necessarily implies that the city's adverse possession was, or may have been, in protection of its undoubted power to hold the common lands.

"It is further urged that the covenant of warranty in the grant to Walker prevents or estops the grantor from beginning an adverse possession or from acquiring any title by adverse possession which will not ac-

crue to the benefit of the grantee. The learned counsel supports the proposition by the citation of House *v.* McCormick (57 *N. Y.* 310–320) and Wilklow *v.* Lane (37 *Barb.* 244-249). There is no need of examining at length the rule by which a grantor with warranty is estopped from questioning the title he conveys, or by which an estate, subsequently acquired by him, inures to the benefit of his grantee. In House *v.* McCormick (*supra*), the ordinary rule was applied to a case where the defendant did not claim a title by adverse possession. It was the simple case of conveying with warranty a fee, with no breach of that covenant, until a claim of title by the covenantor under a deed subsequent, and possession under that deed for a period of short twenty years. The important part of the decision was that the deed with warranty purported to convey the whole of the fee absolutely, and not a fee subject to be opened to let in other remaindermen, from one of whom the defendant gained his title subsequently.

"Wilklow *v.* Lane (37 *Barb.* 244) did refer to a case like the present to a certain extent. The court said, in its opinion, 'John W. Carpenter, being the plaintiff's grantor, by full covenant warranty deed, could not originate a possession adverse to the title under his deed. His deed covered not only the title and interest which he had at the date of the deed, but also any title or interest which he might subsequently acquire.'

"The cases cited from the reports of the State to support this proposition were as follows: Jackson *v.* Reynolds (1 *Caines Cas.* 444). The court based its opinion upon the fact that the relation between the parties was that of landlord and tenant. It said, 'Reynolds has, by his admissions, recognized Low as his landlord; he cannot, therefor, be admitted to dispute his title. The court did not deny the power of a tenant, under all circumstances, to begin adverse pos-

session, for in Brandter *v.* Marshall, decided at the same term (1 *Caines*, 394–402) it said, in relation to a tenant holding over after the lease, 'There can then be no adverse possession, for until 1774 Joseph Marshall did not set up any title adverse to that of Fitch, and since that time twenty years, deducting the period of the British war, have not elapsed.'

"Jackson *v.* Seaman (3 *Johns.* 498) has the same bearing as Jackson *v.* Reynolds. Jackson *v.* Burton (1 *Wend.* 341) has been already stated, and does not support the proposition of Wilklow *v.* Lane. None of the numerous propositions of Bank of Utica *v.* Mersereau (3 *Barb.* 528) decide the point. So far as the question of adverse possession was considered, it was in reference to a party who had gone into possession of land as tenant of another, acknowledging his title. In a case (Kent *v.* Harcourt, 33 *Barb.* 491) not cited in Wilklow *v.* Lane, the court said (p. 497), in reference, apparently, to a grant with warranty: 'But if the grantee enters under the conveyance, and the title he acquires from the grantor is good, so that he cannot be divested of it except by his own act, misfortune or neglect, the doctrine of estoppel, upon which the rule is founded, will no more apply to prevent the grantor acquiring title by adverse possession, commenced subsequent to his conveyance and surrender of possession, than it would to prevent his taking a conveyance from his grantee,' citing Despard *v.* Walbridge (15 *N. Y.* 374). Kent *v.* Harcourt has approved Jackson *v.* Burton, in which it was held that a grantor might, without surrendering possession, commence adverse possession by a notorious and equivocal disclaimer of title.

"Wilklow *v.* Lane is not very explicit. If a grantor with warranty cannot originate an adverse possession, necessarily, under an attempt to originate one, no title at all can be acquired which would inure to the grantee's benefit; or, in other words, if a title

has been made by adverse possession, then adverse possession must have begun. There is no doubt, that it is very difficult to fully state the principles that apply to a warranty, as a personal covenant, as an estoppel, or as conveying a subsequently acquired title.

"If, on the evidence in this case, I could find that possession of the disputed land had ever been delivered, there would be no difficulty in concluding that an adverse title had been subsequently consummated by the adverse possession (Kent *v.* Harcourt, *supra;* Cramer *v.* Benton, 4 *Lans.* 291; Stearns *v.* Hendersass, 9 *Cush.* 497). But I have found to the contrary, and there seems to be no essential difference between the two cases.

"The city owned the land in fee. Conveyance was made with warranty. The city gave possession in part, excluding the grantee from the remainder, which is the land in dispute. Assume, as we have decided, that, as against the grant without a warranty, the city can begin an adverse possession. That is a contradiction or disregard of the party's own deed, which the statute recognizes as the foundation of a title. In this special case, it is repugnant to the deed only as to its relation to a part of the premises. It is evident that a case might be that would prevent the grantee from succeeding in an ejectment against the grantor. A very slight change of the words of the deed, reformed in equity according to the intention of the parties, would prevent an ejectment. An adverse possession comprehends a notice to the person claiming to be owner to bring ejectment. If a grant or bargain, and sale or feoffment can, in this way, be opposed successfully, why should a covenant, that but protects and attends the title, have greater force. The deed conveys the title. If, by presumption or the policy of the statute, the deed falls, its covenants must go with it.

If a bill in equity had been filed, to reform the deed by bounding the property, not by the street, but by the side of the street, it would be no defense that the deed contained a covenant of warranty, that estopped the grantor from denying the grantee's title to one-half of the soil of the street. Another view illustrates the immateriality of the covenant under circumstances like those here. Suppose, upon the city refusing to give full possession to the grantee, what would have been his remedy for the purpose of getting possession? It would have been an action of ejectment, in which the plaintiff's title would have been proved by the granting part of the deed, apart from the covenant. That covenant would not have re-enforced any defect in the deed, as a conveyance of the land. Of course, if adverse possession, continued for twenty years, does not prevail over the deed as such, there would be something as to which the covenant might operate, but I am of opinion that it does.

"I do not see that the giving of possession and re-entering is significant as to the operation of adverse possession against a warranty. There is no doubt, that, as evidence, it is very significant of the adverse claim made. If the covenant is to operate as a transfer of the title by adverse possession, why should it not so operate if possession has once been given? In every other mode of subsequently acquiring title the transfer is made, though possession has been once given. Title by adverse possession necessarily implies that a title has been competently acquired through one or another of the methods of transferring title recognized by law, and which, if relied on by a warrantor, who had not gained title by adverse possession, would inure to the benefit of the covenantee. But the policy of the law forbids an examination of any particular claim, from its conclusive presumption that there has been

some unquestionable claim, which, but for the lapse of time, could have been upheld.

"No allusion, as yet, has been made to the defense that the lot 194, by the terms of the deed, did not extend on the east beyond the post road indicated on the Goerck map. I am of the opinion that on the mere terms of the deed, with the reference to the map, the land conveyed went no further than the road on the map, and that the deed did not convey to the road, that was afterwards opened, farther to the east, and that became Third avenue. They were two different roads, in fact, and the deed and map did not, and did not intend, to refer to the latter. It results from this, that the paper title of the plaintiff, as made by the conveyance to Walker, of lot No. 194, ceases at a point in the southern line of Walker's possession, as we have already described it—three hundred and forty-seven feet west of Third avenue, that point being on the center line of the old post road. But the facts were substantially, as existed in the case of the land to the south, that have been reviewed. Walker and his assigns went into actual and adverse possession of the land, up to the new post road, claiming to own in fee, and title by adverse possession has been perfected. This possession and claim, however, it should be repeated, did not extend to any part of the land in dispute, but as to that the city remained in possession adversely to the whole world beside.

"Before closing, it is proper to thank the learned counsel on both sides for the aid that has been given by their clear and comprehensive briefs and oral arguments.

"I have received proposed findings from plaintiff's counsel, but without passing upon them at present will return them to counsel, that they may make any other requests that are called for by the views expressed in this opinion, and that the defendants' counsel may

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present their requests, which have not been handed to me. I would prefer to pass upon both at one time.

"Judgment for defendants, with costs."

From the judgment entered upon the finding of the court, plaintiffs appeal.

T. Mitchell Tyng,* attorney, and *Thomas H. Hubbard*, of counsel, for appellants.

Townsend & Mahan, attorney for respondent Kane.

Wm. C. Whitney, corporation counsel, attorney for respondent Mayor, &c.; *Francis Lynde Stetson*, of counsel.

PER CURIAM.—The judgment should be affirmed, with costs, on the opinion delivered by the learned judge below.

HENRY HENNEQUIN AND OTHERS, APPELLANTS,
v. HENRY CLEWS AND ANOTHER, IMPLEADED WITH FRED BUTTERFIELD AND OTHERS, RESPONDENTS.

I. STIPULATION.

1. *Not to amend answer.*

(*a*) EFFECT NOT TO LIMIT POWER OF TRIAL JUDGE TO GRANT AMENDMENTS ON THE TRIAL.

1. Where leave had been obtained to serve a supplemental answer and it had been served and accepted, but no formal order was entered, which was not discovered until years

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* The points of counsel are neither abbreviated nor given in full, for the reasons assigned in Stevens *v.* Mayor, &c. (*ante*, p. 274).

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after, when the cause was about to be tried, whereupon a stipulation was entered into, whereby it was stipulated "that an order be entered, and that no other or further or amended answer be allowed to be served, and no other delay shall ensue by reason thereof."

Held,

that the above indicated portion of the stipulation was intended as a provision against a further delay of the trial, and not as a limitation of the power of the trial judge to grant an amendment, as he is expressly authorized by the Code to allow on the trial, in furtherance of justice.

1. ORDER. This, though an order embodying the terms of the stipulation has been entered.

II. ANSWER.

1. PLEA OF DISCHARGE IN BANKRUPTCY.

(*a*) JURISDICTION, AVERMENT OF, WHAT SUFFICIENT.

1. AN ANSWER alleged that defendants, on petition of certain of their creditors, were *duly adjudged* bankrupts under the laws of the United States, and such proceedings were thereafter had that a trustee was duly elected and appointed, having certain persons for his committee; the SUPPLEMENTAL ANSWER ALLEGED *that in pursuance of the bankruptcy proceedings, mentioned in the original answer*, the district court of the United States, for the Southern District, sitting as a court of bankruptcy had (since the service of the original answer) granted to the defendants certificates of discharge under the seal of said court.

Held,

a sufficient averment of jurisdiction.

(*b*) NEGATION OF EXCEPTED CASES.

1. An answer *is insufficient* which omits to aver that the claim or indebtedness sued on was one provable in bankruptcy, and which would be extinguished by a discharge in bankruptcy, and was not one which was exempt from the operation of the bankruptcy statutes.

1. *Amendment on trial.* Although an answer is defective in these particulars, yet, if it has been tacitly treated as sufficient for a long time—say four years—and proceedings and adjudications, with the answer before the court, have been had and made, affecting the merits of the defense of a discharge, the objection becomes a purely technical one, and should be relieved against under section 720, Code of Civil Procedure.

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III. *Trial.*

1. AMENDMENT ON. See supra.

Before CURTIS, Ch. J., and SEDGWICK, J.

Decided June 18, 1880.

The questions determined in the following opinion arose on a trial by the court and jury of the issues in this action, which, as to the defendants Henry Clews and Theodore S. Fowler, had been directed to be tried by jury (see 43 *Super. Ct.* 411, 416; affirmed, 76 *N. Y.* § 598.)

The pleadings upon which the questions relating to the discharge in bankruptcy of defendants Clews and Fowler, aver as follows:

The original answer contained this averment:

"I. The answer of the defendants Henry Clews and Theodore S. Fowler, to the complaint in this action, by J. M. Guiteau, their attorney, shows to the court on information and belief that these defendants, on the twenty-eighth day of November, 1874, on petition of certain of their creditors, were duly adjudicated bankrupts under the laws of the United States, and such proceedings were thereafter had, that Nelson J. Tappan, Esq., was duly elected and appointed the trustee of said defendants, having as his committee Cornelius F. Timpson, William F. Drake and Allan H. Munroe, and that the said trustee succeeds these defendants to all their interest and property in the securities mentioned in said complaint."

The supplemental answer was as follows:

"The supplemental answer of the defendants, Henry Clews and Theodore S. Fowler, to the complaint in this action, served by leave of the court, first had and obtained, shows to the court that subsequent to the service of the original answer herein, in pursuance of the bankruptcy proceedings mentioned in said answer,

and the order of the court of bankruptcy, the district court of the United States for the Southern District of New York, sitting as a court of bankruptcy, did make an order and grant to said defendants certificates of discharge under the seal of said court, on the 24th day of December, 1875, discharging the above-named defendants and each of them, forever, from all debts and claims which, by the Revised Statutes of the United States, title Bankruptcy, are made provable against the estate of said defendants, which existed on the 18th day of November, 1874, excepting such debts, if any, as are by said law excepted from the operation of a discharge in bankruptcy.

"Wherefore these defendants, Henry Clews and Theodore S. Fowler, ask that whatever claim may, by the judgment of this court, be against them, may be adjudged discharged by the aforesaid order and decree of the United States court, and that these defendants have a judgment for costs in this action, and such other relief as to the court may seem just."

The amendment to the supplemental answer allowed by the court on the trial was the insertion, after the word "bankruptcy" and before the prayer, of the following:

"The copies certificates of the bankruptcy discharge of each of the defendants are hereby hereunto annexed, marked respectively, Exhibit A and B, and to be taken as part of this answer.

"And the defendants further allege that the claim and indebtedness set forth in the plaintiff's complaint herein is one that was discharged by the operation of said bankruptcy discharge, and was provable in said bankruptcy proceedings, and was not one which was exempt from the operation of the bankruptcy statutes."

The copies were annexed.

The issues were tried before his Honor JOHN J. FREEDMAN and a jury. In the course of the trial his Honor rendered the following opinion:

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"FREEDMAN, J.—In the answer, as originally interposed, the defendants, Clews and Fowler, pleaded that on petition of certain of their creditors they had been *duly* adjudged bankrupts under the laws of the United States.

"When they subsequently obtained their discharges, they applied for and in 1876 obtained the leave of this court to set it up by way of supplemental answer. In granting such leave this court decided that they were entitled to whatever benefit might accrue to them from the discharge.

"A supplemental answer, setting forth this fact, was thereupon served and accepted, but no order granting leave entered. Years thereafter, when the case was about to be tried and the omission was discovered, an order was, by consent, entered as follows: 'That said answer stand to all intents and purposes the same as if this order had been made and served on the day of the service of said supplemental answer, and that no other or further or amended answer be allowed to be served herein, and no other delay shall ensue by reason thereof, and that said cause shall be restored to the calendar, and set down for trial for the first Monday of January, 1880, &c., &c.'

"It is obvious that this provision against further amendment was intended as a provision against a further delay of the trial, and not as a limitation of the power of the trial judge to grant such amendments as he is expressly authorized by the Code to allow upon the trial, in furtherance of justice.

"With these preliminary remarks I shall at once proceed to deal with the questions directly presented.

"The court of appeals has decided on the appeal from the order of arrest,* that the liability incurred by

* Hennequin *v.* Clews, 45 *Super. Ct.* 108; reversed on this point in 77 *N. Y.* 427.

the defendants in this case, though it is for a conversion, involved no violation of a trust in that particular and technical sense contemplated by the bankruptcy act, but only a violation of contract obligations, and that it was discharged by the discharge in bankruptcy.

"The meritoriousness of the defense having thus been conclusively established, so far as the courts of this State are concerned, and this court having granted leave to set it up to its full extent, it is now claimed that after all the defendants have set it up in such an incomplete way that all evidence relating to it should be excluded. The particular defects alleged are: (1) That the facts which conferred jurisdiction upon the United States district court are not set forth; and, (2) That the plea of discharge does not specifically aver that the indebtedness is one that was provable in bankruptcy, and was not one that was created in consequence of some act excepted by the bankruptcy act.

"As the defendants did not avail themselves of the mode of pleading expressly sanctioned by the bankruptcy act, the questions must be disposed of under the rules of pleading prevailing in the courts of this State.

"There was a time when both these objections would have been held good by the courts of this State if raised at the proper time and in a proper manner. As to the first, however, it was finally settled in Campbell *v.* Perkins (8 *N. Y.* 430), that the discharge might be given in evidence under a plea with notice; and section 161 of the Code provided a short mode of averring the determination of a court or officer of special jurisdiction, which has been retained ever since (see *Code Civ. Pro.* § 532). Under that, I think the answer and supplemental answer, when taken together, are sufficient, so far as the first objection is concerned.

"As to the second I am inclined to think that the

supplemental answer is defective in the alleged particular. But the plaintiffs, having failed to raise the question either by motion to make more definite and certain, or by demurrer, and tacitly treated the plea as sufficient for nearly four years, the objection, in view of the proceedings since had and adjudications since made, affecting the merits of the question, has become a purely technical one, and the defendants should be relieved against it under section 723 of the Code of Civil Procedure.

"The defendants should have leave to amend, and the certificate of discharge should be received in evidence."

The above amendment was thereupon made. The discharge was received in evidence, and a verdict directed for the defendants.

From the judgment entered on the verdict plaintiffs appealed.

C. Bainbridge Smith, attorney, and of counsel, for appellant, after arguing in support of the proposition that plaintiff's claim could not, under the provisions of the bankruptcy act be affected by defendants' discharge, urged:—The supplemental answer of the defendants was so defective that it was conceded the discharges of the defendants in bankruptcy could not have been proved under it. The answer did not show that the plaintiffs' debt was not created by the fraud of the defendants, or while acting in a fiduciary capacity. It did not aver the court had jurisdiction of the defendants, and it did not set out a copy of the discharge (*U. S. Rev. Stat.* 993, § 5119).

1. In pleading a bankrupt discharge a general averment that the court by which it was granted had jurisdiction will not answer. The facts necessary to confer jurisdiction must be set forth (Sackett *v.* Andross, 5 *Hill*, 327; Stephen *v.* Ely, 6 *Id.* 607. See

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McLaughlin *v.* Nichols, 13 *Abb. Pr.* 244; *Story Equity Pl.* § 726). 1. It is necessary to aver, to constitute a good plea of bankruptcy, that the claim sued on was one provable under the bankrupt law, and that the defendant has been discharged under the bankrupt law, and that the defendant had been discharged by the judgment of the proper court, and had received a certificate of such discharge (McNulty *v.* Frame, 1 *Sandf.* 128; Hayes *v.* Fowler, 25 *Mass.* 169; Maples *v.* Burnside, 1 *Denio*, 332; *Abbott's Forms*, 475, No. 300). 2. A copy of the discharge should be set forth (*U. S. Rev. Stat.* § 5119) In the case of Stall *v.* Wilson, 11 *Bank. Reg.* 57, the court held that a plea of discharge which does not set forth a copy of the discharge is bad. The head-note of same case, in 38 *N. J.* 198, is: "That a plea setting up a discharge under the United States bankrupt act *must* set out a copy of the discharge and conclude with a verification."

II. The question is not one of variance, but whether the discharges in bankruptcy have been pleaded.

III. The plea of a discharge is not a privileged one, and it seems even a default will not be opened to admit it (Park *v.* Casey, 25 *Texas*, 536; Holyoke *v.* Adams, 59 *N. Y.* 239; Medburg *v.* Swan, 36 *Id.* 200).

IV. If the defendants were entitled to amend their answer, it was under section 723 of the Code of Civil Procedure (*Code Civ. Pro.* § 723; Pratt *v.* Hudson R. R. Co., 21 *N. Y.* 313, 314). 1. This section, as does also section 173 (*Code of Pro.*), contain the words "in furtherance of justice." To allow a defendant to plead his bankrupt discharge as a defense to a debt such as the one at bar, would not be in furtherance of justice (Holyoke *v.* Adams, 59 *N. Y.* 239).

V. The following are cases in which answers were held defective: Gihon *v.* Levy, 2 *Duer*, 176; Ayrault *v.* Chamberlain, 33 *Barb.* 229, 237; Wachter *v.*

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Quenzer, 29 *N. Y.* 547, 551; Gould *v.* Homer, 12 *Barb.* 61; see also Greggs *v.* Howe, 3 *Keyes*, 166; Mallory *v.* Lamphear, 8 *How. Pr.* 491.

VI. According to the whole current of authorities the defendants could not prove their discharges except by amending their answer. Should that have been done? The defendants have sworn in their answer positively that the bonds "were hypothecated for the purpose, among other things, of carrying out the letter of credit and the arrangements between the plaintiffs and these defendants." 1. If this positive averment is true the defendants have a defense. 2. If false, they are not entitled to any favor from the court. 3. The defendants also pleaded accord and satisfaction, to which the same remarks as above are applicable.

VII. It is submitted that the amendment was not in furtherance of justice, and should have been disallowed. Stipulations between the attorneys are binding. The defendants had been guilty of laches in not obtaining an order for leave to serve a supplemental answer. It was agreed between them that if the plaintiffs would accept the supplemental answer served no other or further supplemental answer be made or served. An order of the court was also entered to the same effect (Cox *v.* New York Central R. Co., 63 *N. Y.* 414; McGuire *v.* New York Central R. Co., 6 *Daly*, 70; Oliver *v.* Bennet, 65 *N. Y.* 559; Foster *v.* Fitzsimmons, 3 *Hun*, 674).

J. M. Guiteau, attorney, and *Wm. A. Abbott*, of counsel, for respondent, urged:—I. The claim in suit is discharged by the bankruptcy discharges of the respondents, and is not such a claim as is excepted from the operation of such discharges by section 5117 of the United States Revised Statutes, title Bankruptcy (Hennequin *v.* Clews, 77 *N. Y.* 427).

II. The amendment of the supplemental answer on

the trial was discretionary with the court, and is not reviewable on appeal (Richtmeyer *v.* Remsen, 38 *N. Y.* 206; *Code Civ. Pro.* § 723; *Code Pro.* § 173).

III. Even if reviewable on appeal, the amendment should have been allowed. (*a*) For the reasons stated in the opinion of the court, hereto annexed, and adopted as part of this brief, as to this point. (*b*) Because the defendants' attorney had no authority or right to make any consent cutting off these respondents from the right to have the court allow said supplemental answer to be amended. (*c*) Because said consent and order was superfluous and unnecessary, and the advantage sought to be got from same by plaintiff's counsel is unreasonable and unjustifiable.

IV. The amendment to the supplemental answer was allowed out of abundant caution only. Said answer pleaded the discharge substantially as provided in section 349 of the United States Revised Statutes.

PER CURIAM.—The judgment should be affirmed, with costs, for the reasons given by Judge FREEDMAN, upon his direction to the jury to find for the defendants.

JOHN KECK, ET AL. *v.* JOHN WERDER.

Judgment—when set aside to allow assignee in bankruptcy to come in and defend.

This action was brought for dissolution of the copartnership between plaintiffs and defendant, and for an accounting; also for damages for inducing plaintiffs by false representations to enter into said copartnership; upon the issue of fraud a verdict was rendered for

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plaintiffs, and the referee before whom the accounting was had, reported that the amount thereof should be paid out of the individual interest of the defendant in the partnership assets which had been collected and paid into court. Prior to the confirmation of the referee's report, the defendant was adjudged a bankrupt, and two years after entry of final judgment upon the report and payment to plaintiffs thereunder, defendant's assignee petitioned that the judgment be set aside and that he be substituted in place of defendant, and be allowed to come in and defend.

It appeared that plaintiffs were ignorant of the proceedings in bankruptcy till after entry of final judgment and payment of the funds thereunder.

Held, that the prayer of the petition was properly denied; that the relief asked for must be sought in an independent action.

Before SEDGWICK and FREEDMAN, JJ.

Decided November 22, 1880.

Appeal by assignee in bankruptcy from order denying the prayer of a petition made by him, that the judgment entered be set aside, and that the assignee be substituted in place of defendant, and allowed to serve answer and defend.

On the hearing of the petition the following appeared to be the facts: The plaintiffs, being partners in business with defendant, brought this action for a dissolution of the copartnership, and an accounting. Their complaint also claimed damages against the defendant, for inducing, by fraud, the plaintiff to enter into the copartnership. The defendant, among other things, in his answer, denied the fraud and the damage. The issue as to the fraud was tried by jury, and there was a verdict for plaintiffs in the sum of $6,255.41. A receiver was appointed in the action. Interlocutory judgment was entered for an accounting, and a reference for that purpose. The referee reported that the parties were entitled individually to amounts to be paid out of the assets that had been collected by the receiver, and by him paid into court. The referee

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also reported that the amount of the verdict should be paid to the plaintiffs out of the individual interest of the defendant in the funds in court. Before the report was confirmed, and before final judgment in accordance therewith was entered, the defendant was, upon petition of his creditors, declared a bankrupt, in the United States district court in bankruptcy for the District of New Jersey. Assignees were appointed, of whom the petitioner was survivor. The plaintiff and his attorney, and the defendant's attorney, were ignorant of the proceedings in bankruptcy, and remained ignorant of them until long after entry of final judgment. Final judgment was entered, and under its provisions the plaintiffs demanded and received from the clerk of the court an amount which included the amount of the verdict. More than two years after this, the appellant filed his petition, asking that he should be admitted to defend, that the action should be continued by the plaintiff, that the judgment entered and all proceedings taken after the commencement of the bankruptcy proceedings be vacated for irregularity, upon the ground that such proceedings were in violation of the bankrupt act, and that the moneys which had been taken out of court under the judgment should be returned. The petition claimed relief on the ground of collusion, but there was no evidence of collusion, and on the argument of the appeal, that ground was abandoned. The court denied the motion to grant the relief asked.

Nelson Smith, for appellant, urged:—I. The proceedings in this case, after the adjudication of the defendant bankrupt and the appointment of his assignees, and the assignment to them by Judge NIXON, were irregular. (*a*) The title of the assignees in bankruptcy of the defendant relates back to December 29, 1876, when the petition for his adjudication

was filed against him (*U. S. Rev. Stat.* § 5,044; Sutherland *v.* Davis, 10 *Bank. Reg.* 424; Hampton *v.* Rouse, 11 *Id.* 472; Layton *v.* Harwood, 12 *Id.* 360; *Blumenstiel Bankr.* 178–188). (*b*) The bankrupt was, upon his adjudication on February 2, 1877, so far as related to his property, to be regarded as civilly dead; and no proceedings after the appointment of his assignees, and the assignment to them, affecting his property could be taken until they were brought in (Herndon *v.* Howard, 9 *Wall.* 664; S. C., 4 *Bank. Reg.* 212; Lowery *v.* Morrison, 11 *Paige*, 327, 329; Requa *v.* Holmes, 16 *N. Y.* 196; Russell *v.* Sharp, 1 *Ves. & Beame*, 500; *Story's Eq. Pl.* 158, A; Storm *v.* Davenport, 1 *Sandf. Ch.* 135, 138; Penniman *v.* Norton, 1 *Barb. Ch.* 246; Deas *v.* Thorn, 3 *Johns.* 543). (*c*) Intermediate to the commencement of proceedings in bankruptcy and the assignment to the assignees, neither the debtor nor any person can do any act in any way affecting the title of such assignee. The bankrupt is to all intents and purposes as regards his property *civiliter mortuus*, and every agreement made by him in relation to his estate while in that condition, is void (*In re* Anderson, 9 *Bank. Reg.* 360; Sparhawk *v.* Drexel, 12 *Id.* 450; *Blumenstiel*, 179–182; Miller *v.* O'Brien, 9 *Bank. Reg.* 26). (*d*) Third parties are deemed to have constructive notice of the filing of the petition and of the proceedings thereunder, and they cannot, by any act on their part, after such proceedings have been commenced, alter or change the condition of the estate as against the assignee. A debtor to the bankrupt, who in good faith, without actual knowledge of the proceedings, pays his debt to the bankrupt, is nevertheless liable to the assignee (Howard *v.* Crompton, 14 *Blatchf.* 328; Mays *v.* Manufacturers' Nat. Bk., 4 *Bank. Reg.* 446; Stevens *v.* Mechanics' Savings Bk., 101 *Mass.* 109; *Blumenstiel*, 181, 182). (*e*) The bankrupt being regarded by his adjudication,

as respects his property, civilly dead, such death works the same legal results as if he had actually died, and consequently operates as a revocation of the authority of the attorney in the suit (Gleeson *v.* Dodd, 4 *Met.* 333; *Weeks on Attys-at-Law*, § 192). No order after the death of a party can be made in the cause until his executor, administrator or assignee in bankruptcy is brought in (Holmes *v.* Requa, 16 *N. Y.* 196). (*f*) The only instances in which a suit pending in favor of or against a person who is afterwards adjudicated a bankrupt is allowed to proceed, after his assignees are appointed, without bringing them in, are: 1. Where the bankrupt has no interest in the property to be affected by the final decree; or when the suit is on a contract made in the name of the bankrupt, as agent for another (Rhodes *v.* Blackstone, 103 *Mass.* 334); or where the bankrupt had assigned the claim in suit before the bankruptcy (Sucally *v.* Taylor, 33 *Tex.* 668). 2. In the cases provided for by section 5,106 *U. S. Rev. Stat.*, which allows actions to proceed for certain purposes, namely, if the amount due to a creditor is in dispute, a suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which may be then proved in bankruptcy. 3. So, too, in a suit to foreclose a mortgage, a judgment for the sale may be taken if done before assignees are appointed, the suit having been commenced previously to the filing of the petition (Lenihan *v.* Hamman, 55 *N. Y.* 652). The reason of this is, that until the assignees are appointed, the title of the property remains in the bankrupt (Hampton *v.* Rouse, decided by U. S. Supreme Court, 11 *Bank. Reg.* 472).

II. The judgment or decree entered herein, May 31, 1877, was by default, no exceptions having been filed to the referee's report; the plaintiffs proceeded upon the theory that it stood confirmed under rule 30 of the

courts, for want of exceptions. Upon the theory that the authority of the defendant's attorney was revoked by his adjudication as a bankrupt, and the appointment of his assignees, he had no right to file exceptions; but whether he had or not, it is certain that the failure to file exceptions was suffering a default, and the decree entered upon the report as confirmed for want of exceptions is a decree, in fact, by default.

III. The appellant was entitled as matter of right to be admitted to defend this action upon his requiring it, under the provisions of section 5047, United States Revised Statutes. (*a*) That section first provides, that if, at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing, which might or ought to pass to the assignee, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, and if any suit at law, or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of the bankrupt, the assignee may defend the same in the same manner, and with like effect as it might have been defended by the bankrupt. (*b*) This being a suit for the distribution of certain property owned by the bankrupt and the plaintiffs jointly together, the defendant has the same status as the complainant, it being immaterial in such cases which party commences the suit; it is, as respects the division of the property, for the benefit of both.

IV. The verdict of the jury, no judgment having been entered upon it before the appointment of the appellant as defendant's assignee in bankruptcy, is not even evidence of debt. Issues in equity cases are framed and sent to the jury simply to inform the conscience of the court, and their verdict can be used only upon the final hearing as evidence (Black *v.* Shreeve, 3 *Beasley Ch.* [*N. J.*] 469). The court will ex-

ercise its discretion upon the final hearing as to how far it is to be controlled by the findings of the jury, and is not precluded even then from rejecting the verdict, or from finding the questions of fact itself contrary to the verdict (Hegeman *v.* Cantrell, 8 *J. & S.* 386; Wallace *v.* Am. Linen Thread Co., 16 *Hun*, 404). The practice upon feigned issues was fully considered in Snell *v.* Loucks (12 *Barb.* 385) by WILLARD, J., approved in 16 *Hun*, 406.

V. The appellant, as assignee in bankruptcy of the defendant, was entitled to have the action continued against the plaintiff, John Keck, Jr., as survivor, and Katrina Keck, as the executrix of John Keck, Sr., deceased, under Civil Code, § 758. That section authorizes the action to be continued against the surviving partner, and the court to make an order bringing in the proper representative of the deceased, when it is necessary so to do, for the proper disposition of the matter. Here it is necessary that the representative of the deceased Keck should be brought in, so as to dispose of the whole matter, and especially for the return of the money which has been taken out of court.

VI. The appellant being entitled to have the judgment set aside, and to come in and defend, it follows, as matter of course, that he is entitled to have the money taken out of court returned.

VII. All of the persons who participated in taking the money out of court had constructive notice of the assignee's rights. Constructive notice is in legal effect conclusive evidence of notice. Constructive notice arises from legal inference so strong, that the presumption of notice, when it arises at all, is conclusive even against the truth of the fact (Wild *v.* Gibson, 1 *H. L.* 605; Plumb *v.* Flewitt, 2 *Anstr.* 432; Kennedy *v.* Green, 3 *M. & K.* 719; *Wade on Notice*, § 37; Birdsall *v.* Russell, 29 *N. Y.* 220). Judge STORY defines

e notice as knowledge imputed by the court, ption too strong to be rebutted; that the must have been communicated (*Story Eq.*).

y Shafer, attorney, in person, and for John

n Cole, for respondents, urged:—I. Section e United States Revised Statutes, under relief is sought, is as follows: "The as- l have the like remedy to recover all the s and effects in his own name as the debtor had if the decree in bankruptcy had not ed and no assignment had been made. If, of the commencement of the proceedings tcy, an action is pending in the name of the he recovery of a debt, or other thing, which ught to pass to the assignee by the assign- ssignee shall, if he requires it, be admitted to ie action in his own name, in like manner and fect as if it had been originally commenced nd if any suit at law or in equity in which pt is a party in his own name is pending at of the adjudication in bankruptcy, the y defend the same in the same manner and ffect as it might have been defended by the

The statute only gives the assignee a erpose in pending suits, and hence an effort this case to set aside the judgment and final as to make a pending action in which the ay intervene.

assignees have no right to make this motion. this motion, the most they can claim is that n the shoes of John Werder. If he could his motion, the assignees cannot. Now, so arties to the suit in this court are concerned,

there is nothing in the papers showing, or tending to show, any collusion, or that the action of the court was in any way irregular or improper. If, in fact, a third person not before the court was the owner of the subject-matter, this does not authorize him to come before the court in an action to which he is not a party, and seek to set aside its process. His remedy is by an independent action.

III. Unless there have been proceedings taken in this suit which would authorize the defendant to come in and have these orders set aside, the matter seems to stand precisely as though these moneys had been paid without the orders of the court. Unless there was collusion on the part of the parties before the court, the fact that the payments were actually made under the orders of the court does not change the situation in favor of Werder's assignees. Now, if the plaintiffs, with full knowledge of the bankruptcy, received property from the bankrupts belonging to the assignees, they did so at the risk of being compelled to restore it if the assignees took proceedings within the proper time. and this was the only penalty to which they subjected themselves.

IV. The plaintiffs owed no duty to the assignees of Werder. They were entitled to obtain the money owed to them, if they could get it. The gravamen of the complaint on the part of the assignees is that the plaintiffs, and their attorney, and the referee, have obtained property belonging to them. If so, and the assignees are not prevented by the statute of limitations, the courts are open to them to establish their rights. But if at one time the assignees were entitled to this property, this furnishes no reason why this court should revive an action upon which the remedy may now be cut off by granting the order asked for here.

V. There was no fraud or collusion of any kind

practiced upon the court in this case. It was not incumbent upon any of the parties to notify the court of the bankruptcy proceedings. This court was in no way thereby deprived of jurisdiction either over the parties or the subject-matter. If the assignees saw fit to come in they might have done so. They could, if they saw fit, refuse to father the action begun. If the court had had knowledge of all the facts, it would have been entirely proper for it to have proceeded in the suit without any regard to the assignees, if they did not choose to assert their rights. And if the assignees did not discover their rights in time to assert them, this is their misfortune.

VI. Besides, the fund in question being in court in the action constituted a special fund for the purposes of the action. No outsider could touch it until the determination of the action. The fund was before the court for distribution among the parties to the action, and, being there, the court would proceed to administer the fund in spite of bankruptcy proceedings (Clark *v.* Binninger, 38 *How. Pr.* 341; Same *v.* Same, 39 *How. Pr.* 363). And the fact that the action was by one partner against another, does not change the true principle underlying the case. If the Kecks, for any cause of action, had had a receiver appointed, the funds in his hands would be subject to the orders of the court appointing the receiver, and only that portion which might ultimately be found due to Werder would pass to his assignee in bankruptcy. The receiver was appointed in 1872, and the plaintiffs' lien upon the moneys in his hands was not affected by the bankruptcy proceedings. The assignees might have been entitled to a part of the fund if it had turned out that Werder was entitled to any portion of it, otherwise not. They could not touch the fund as against the plaintiffs. There is nothing in the papers here which shows that the judgment and orders which it is sought to set aside are in any

way incorrect, and without such proof this motion should not, in any event, be granted.

VII. The court, in the exercise of its discretionary power, should not set aside this judgment and these orders, and revive the action, in the entire absence of fraud and collusion.

VIII. I know of no case under the bankrupt law of 1867 which holds that the bankruptcy of a party is an abatement of the suit.

BY THE COURT.—SEDGWICK, Ch. J.—I am of opinion that the prayer of the petition was properly denied. The judgment, which it was asked should be set aside, had been carried into effect. The fund, which the bankruptcy assignee now claims, had been paid over to the plaintiff. It is not necessary now to ask what would have been the remedy of the bankruptcy assignee, if the fund had been in existence at the time of the petition, either in court or in the plaintiffs' hands. The fund had become part of the general property of the plaintiffs, and there was not any attempt to trace it.

It was not claimed that the plaintiffs had practiced any deception upon the court or abused its process, or even acted fraudulently as to the petitioner. There was, therefore, no ground that the court, acting upon the motion of the assignees, should assert its power by order and proceedings for contempt, to compel a wrong-doer to place matters *in statu quo*.

The plaintiffs could not have been compelled to replace the fund on the principles that apply to orders of restitution; because, although the judgment might have been set aside, it would not have been set aside for the reason that it then appeared that the plaintiff had no right to the fund, or owed the petitioner the amount of it; but simply to allow a new litigation as to who was entitled to it. To justify an order of

restitution, it must at the time appear that the prevailing party was not entitled to the judgment which has been set aside.

Under these circumstances, an order that the plaintiffs should pay the amount into court would express an adjudication as to his obligation to the petitioner to do so, and could not be enforced by proceedings to put them in contempt, or by execution.

It is clear, that unless the fund was restored, the rest of the relief prayed for would be useless. The thing claimed by the answer of the petitioners, if they were allowed to make one, or by any proceeding they might take, would be, that they were entitled to that part of the fund that represented the individual property of the bankrupt in the partnership assets. Such a claim could have no object if there were no fund. Any claim they might make that the plaintiffs wrongfully took and were not entitled to take that part of the fund, inasmuch as the assignee was its true owner, would, if the position was valid on the law and the facts, entitle the assignee to a judgment for damages. This, however, is a substantive cause of action, which must be asserted in an action. In advance of a judgment determining such a cause of action in petitioner's favor, there can be no adjudication in his favor that would allow setting aside the judgment which the plaintiffs have obtained in this action. In effect, the assignee asks a decision in his favor upon the merits, in a proceeding where the plaintiffs are not, by law, called upon to frame an issue as to the merits.

The order should be affirmed, with costs, and the disbursements to be taxed.

FREEDMAN, J., concurred.

Appellant's Points.

CECILIA A. MERCERON *v.* ANDERSON FOWLER, IMPLEADED, ETC.

Recovery of costs against party beneficially interested in claim.

Where the owner of a claim assigns the same to a third party, upon consideration that the said assignee shall begin and prosecute an action thereon, at his own expense, and when the said claim is collected pay to the assignor one-half of the amount received over and above all costs, said assignor is beneficially interested in the recovery, under 2 *R. S.* 619, § 44, and is liable for the costs of the action so brought. This, though he did not retain or appoint the attorney, or furnish funds for the prosecution of said action, or in any way interfere therewith, or direct the progress thereof.*

Before SEDGWICK and FREEDMAN, JJ.

Decided November 22, 1880.

Appeal by third party from order directing the payment, by him, of costs recovered by defendant.

The facts are stated in the opinion.

Black & Ladd, attorneys, and *Wm. W. Ladd*, of counsel, for appellant, urged:—I. The provision of the Revised Statutes, regulating the granting of orders such as the one appealed from, is as follows: "Where any action shall be brought in the name of another, by an assignee of any right of action, or by any person beneficially interested in the recovery in such action, such assignee or person shall be liable for costs in the same cases and to the same extent in which a plaintiff would be liable" (3 *R. S.* pt. 3, c. 10, tit. 1, § 11, p. 899, 6 ed.). The plain reading of these lines requires two things to con-

* In Marvin *v.* Marvin (78 *N. Y.* 541) it was held that such an application is a special proceeding, and that, under the statute, costs are allowable therein; but see section 3247, Code Civil Procedure. When such an application will be held premature, see Slauson *v.* Watkins, *ante*, p. 172.

cur in each case before a person can be thus summarily charged with costs: 1st. He must have brought an action in the name of another. 2d. He must be the assignee of the cause of action, or be beneficially interested in the recovery. No other construction gives full and equal effect to all the clauses of the provision cited. The object of the statute was not to render assignees of causes of actions or persons beneficially interested in an assigned cause of action liable for costs in every event where suit was brought in the name of a third party. The sole object was to reach cases where, after going through the form of an assignment, a party still retained to himself the direction of the suit.

II. The language of the decisions is uniform that the party to be charged must not only be beneficially interested in the recovery, but must be shown to have brought the suit. He must appear to have in some way controlled or directed the progress of the litigation, or to have actively intermeddled with it (Whitney *v.* Cooper, 1 *Hill*, 629–633; Bliss *v.* Otis, 1 *Den.* 656; Giles *v.* Halbert, 12 *N. Y.* 32–34; Wheeler *v.* Wright, 23 *How. Pr.* 228; Cutter *v.* Reilly, 31 *How. Pr.* 472; Gallatin *v.* Smith, 48 *How. Pr.* 477; Ward *v.* Roy, 69 *N. Y.* 96).

III. "In an application of this nature the moving party holds the affirmative, and is bound to make out a satisfactory case" (DENIO, Ch. J., in Wolcott *v.* Holcomb, 31 *N. Y.* 125; Whitney *v.* Cooper, 1 *Hill*, 629–635). The moving affidavit is on information and belief. The opposing papers are clear, positive and unequivocal. There is no conflict of testimony. The evidence is clear to the point that the appellant did not procure this suit to be brought nor intermeddle with it. No facts or circumstances are shown to overcome appellant's positive denials.

Martin & Smith, attorneys, and *Aaron P. Whitehead*, of counsel, for respondent.

Opinion of the Court, by SEDGWICK, Ch. J.

BY THE COURT.—SEDGWICK, Ch. J.—To justify the order appealed from it was necessary to show that the appellant had brought the action in the name of another, and that he was beneficially interested in the recovery (2 *R. S.* 619, § 44). There was no doubt that he was beneficially interested in the recovery, within the meaning of the statute. On the other hand, there was no doubt that he had not interfered with the progress of the action after it was begun. He had not specifically directed any proceeding, nor had been consulted at any stage; nor had he furnished money for the action. The plaintiff had promised to begin and prosecute at her own expense. He did not retain or appoint the attorney.

The statute, however, does not place the responsibility of a third party upon these incidents. They are important as evidence as to his relation to the bringing of the action, but the statute makes the liability complete, if within its meaning he has brought the action in the name of the plaintiff (Wheeler *v.* Wright, 14 *Abb. Pr.* 353).

It is manifest that, so far as the form of the action is concerned, the plaintiff is the only person that can be said to bring it. The acts of his attorney as his agent are his acts. The statute, however, considers that some one may bring the action, while he is not plaintiff. An instance is: an attorney who, beneficially interested as a matter of fact, brings the action, is liable for costs (Voorhees *v.* McCartney, 51 *N. Y.* 387; Bliss *v.* Otis, 1 *Den.* 656). Also, a third party who appoints an attorney who, as matter of fact brings the action, is liable (Giles *v.* Halbert, 12 *N. Y.* 32; Whitney *v.* Cooper, 1 *Hill.* 629).

It is clear that when a third party directly causes another to bring an action, leaving such other to appoint his own attorney, he is liable for costs, if he also be beneficially interested in the recovery.

Opinion of the Court, by SEDGWICK, Ch. J.

Of course such action must be brought by the third party in the name of another, that is, the plaintiff must not act for himself upon a substantive right of his own that exists independent of the claim of interest of the third party, but if he acts for the benefit of the third as well as for himself, the case is within the statute. Giles *v.* Halbert (*supra*), is such a case. In that case it may be, that so far as the bringing of the action was concerned, it was held that the third party was liable because he had retained the attorney, yet it was also held that it was brought in the name of another, although the plaintiff was the person in whose favor the cause of action originally accrued, and who still had a right in it.

In this case the third party, the appellant, assigned to the plaintiff the whole cause of action. If that had been all there would be no ground for saying that the appellant had brought the action, nor that he had brought it in the plaintiff's name. But the consideration of that assignment was a contract by the plaintiff that she would begin and prosecute the action at her own expense, and that when the claim was collected she would pay to the assignor one-half of the amount received by her, over and above all costs.

This contract was more than a request to bring the action; it was a demand that it should be brought, and when the plaintiff begun the action she did not bring it in the exercise of her independent right as owner of the claim, but under the demand of the contract.

I am therefore of the opinion that the order appealed from should be affirmed, with $10 costs.

FREEDMAN, J., concurred.

Appellant's Points.

JOHN M. JORDAN, RESPONDENT, *v.* HENRY C. BOWEN, APPELLANT.

Evidence—exhibition of wounded limb in action for personal injuries.—Judge's charge—exception to.

In an action for injuries to the person, caused by the negligence of defendant, it is not error to allow the plaintiff to exhibit to the jury the injured limb; *e. g.*, an arm which has been crushed by machinery.

Where such an action has been brought by a minor who becomes of age before the trial, a general exception to the proposition in the judge's charge, that the plaintiff, if entitled to recover, is entitled to compensation for the time during which he had been unable to labor, presents no ground for reversal.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided, November 22, 1880.

Appeal by the defendant from a judgment in favor of plaintiff, entered upon a verdict for $3,000, and from an order denying a motion for a new trial on the judge's minutes.

The action was brought to recover for personal injuries suffered by the plaintiff while in defendant's employment, from the machinery of a printing press while in motion.

Among many exceptions taken upon the trial by the defendant was one to the ruling of the judge permitting the plaintiff to exhibit to the jury his right arm, which was greatly mutilated and injured; there was also an exception to the judge's charge in regard to damages, which is fully stated in the opinion.

Nash & Holt, attorneys, and *George C. Holt*, of counsel, for appellant, among other things, urged:—I. The court erred in the charge as to damages.

Appellant's Points.

The court charged that if the plaintiff should recover, he would be entitled to compensation, among other things, "for the time he has been deprived of the ability to labor." To this defendant's counsel duly excepted. It appeared in the case that the plaintiff, at the time of the accident, was sixteen years of age; that the plaintiff's father is still living, and has brought an action, which is still pending, against defendant, for the loss of his son's wages because of this accident. The father of a minor son is *prima facie* entitled to his earnings during minority. The father may relinquish this right, but such relinquishment must be proved (Shute *v.* Dorr, 5 *Wend.* 204; 1 *Pars. Cont.* 309). In this case, not only was there no proof of such waiver, but it actually appears that the father is suing to recover for the loss of these wages. To permit their recovery in this action, therefore, was error. The recovery in this action will be no bar to the pending suit by the father.

II. The court erred in permitting the plaintiff to show his arm to the jury. As this exhibit is not before the court on this appeal, the appellant has a right to ask the court, in passing on this point, to assume that the appearance of the plaintiff's mutilated arm was extraordinarily revolting, and calculated to cause extreme commiseration for plaintiff to be felt by the jury.

The exhibition of this mutilated arm was not only calculated to unduly excite the pity of the jury, and was a kind of evidence from which the jury might draw entirely erroneous conclusions, but it was a kind of testimony differing from ordinary exhibits, in that it was optional with plaintiff whether to have it introduced or not. The defendant could not have obliged the plaintiff, on the stand, against his will, to make such an exhibition of his person as was made before the jury. The court can, undoubtedly, in a proper

case, involving a question of personal injury, compel a party to submit out of court to a surgical examination as a basis for surgical testimony on the trial; but surely no witness could be compelled in open court unwillingly to exhibit any part of his or her person not customarily exposed. If so, where will the right stop? No testimony should be admissible which is not admissible on the demand of either party. To permit a party to introduce evidence, if it helps him, which, at the same time, he can keep out if it hurts him, is clear injustice.

David E. Gwynne, attorney, and *Richard O'Gorman*, of counsel, for respondent, among other things, urged:—I. The plaintiff had a right to claim for loss of time before and after the trial, he was of age before the trial; the defendant's counsel did not discriminate in his objection to this.

II. The court exercised its discretion properly in refusing and allowing introduction of evidence. The jury were not misled. The defendant's counsel improperly objected to the plaintiff showing to the jury the condition of his arm. In an action to recover damages for an injury to the limb, the injured limb may be exhibited on trial, to be inspected by the court and jury (*Wharton Ev.* § 346; Mulhado *v.* Railroad Co., 39 *N. Y.* 370; State *v.* Garnett, 71 *N. C.* 85; Wiener *v.* State, 66 *Mo.* 13; Walsh *v.* Sayre, 52 *How. Pr.* 334).

BY THE COURT.—FREEDMAN, J.—Upon the question of defendant's negligence, as well as upon the question of plaintiff's alleged contributory negligence, the evidence was sufficient to carry the case to the jury, and hence defendant's motions for a dismissal of the complaint and for the direction of a verdict were properly denied. Nor can I discover any valid objection to the charge under which the whole case was submitted to

the jury, or any merit in any of the exceptions taken by the defendant to the refusals to charge otherwise.

Upon the question of damages, the defendant might have asked to have the jury instructed that the father of the plaintiff was entitled to the earnings of the plaintiff during his minority, and that, consequently, they had no right to include in their estimation any damage sustained by the plaintiff in this respect during his minority. If such a request had been duly made and refused, an exception taken to such refusal might be pressed as a ground for a new trial. But, as no such request was made, nor the attention of the trial judge called to the point, and as the plaintiff had become of age before the trial, a mere general exception to the proposition charged, that the plaintiff, if entitled to recover, was entitled to compensation, among other things, for the time he had been deprived of the ability to labor, presents no ground for reversal.

The exceptions to the admission of testimony and the denial of the motion for a new trial appear to be equally untenable.

The judgment and order should be affirmed, with costs.

SEDGWICK, Ch. J., concurred.

SAMUEL LEWIS, RESPONDENT, *v.* JAMES P. FARRELL, APPELLANT.

Security for costs—when ordered—laches in demanding.—Superior court—jurisdiction of.

Under the provisions of the Code of Civil Procedure, a defendant in an action brought in this court cannot demand security for costs upon the ground that the plaintiff is a non-resident, when the plaintiff resides within this State.

Statement of the Case.

Where the defendant neglects for nearly a year to make his motion for security, knowing that the plaintiff resides without the city and county of New York, the action in the meantime having come to issue and been for many months upon the calendar, his delay constitutes such laches as will justify the court, so far as the motion is addressed to its discretion, in denying it upon that ground alone.

The statutes relating to the jurisdiction of this court, reviewed and considered.

Before SEDGWICK, Ch. J., and RUSSELL, J.

Decided November 22, 1880.

Appeal from an order denying the defendant's motion that the plaintiff be required to give security for costs.

This action was brought to recover the sum of $6,000, which the plaintiff claims to have deposited with the defendant in 1874. The answer admits the receipt of the money, but alleges that it was to be applied to certain purchases for the plaintiff's benefit; that it was so applied, and that not only was the amount deposited by the plaintiff exhausted in such purchases, but that the defendant advanced moneys on the plaintiff's account, for which he counter-claims. The complaint was served August 8, the answer September 8, and the reply December 24, 1879. The case was noticed for trial in February, 1880, and was on the calendar, at the time of this appeal, but had not been reached. The order to show cause in this matter was granted July 14, returnable August 5, 1880; the order denying the defendant's motion, now appealed from, was entered September 7, 1880. It was alleged in the plaintiff's affidavits, used upon this motion, that the plaintiff and defendant were formerly on terms of intimacy, and that the defendant well knew at the time this suit was brought that the plaintiff lived in Brooklyn.

D. & T. McMahon, attorneys, and *Denis McMahon*, of counsel, for appellant.

B. Lewinson, attorney, and *Lewis Sanders*, of counsel, for respondent.

BY THE COURT.—HORACE RUSSELL, J.—On the argument of this appeal, the defendant's counsel insisted that, under the Code, as recently amended, his client was entitled, as a matter of absolute right, to have his motion in this matter granted. The plaintiff's counsel, on the other hand, insisted:

First. That this was not a case contemplated by the Code, in its provisions relating to security for costs.

Second. That if it was, the matter was still within the discretion of the court; and,

Third. That the defendant was guilty of such laches in making his motion that it was properly denied on that ground.

1. The provision of the Revised Statutes (2 *R. S.* 620, § 1), which formerly controlled this subject, was: "When a suit shall be commenced in any court for a plaintiff not residing within the jurisdiction of such court, or for several plaintiffs who are all non-residents, the defendants may require the plaintiffs to give security for costs." The act organizing the superior court (*Laws of* 1828, p. 141, c. 137) made it a local court, and prohibited the sending of its process into any other county, except process of subpœna and attachment for disobedience thereof. The acts of 1840, 1844 and 1847 extended the power of the court to the extent of authorizing transcripts of its judgments to be filed in other counties, and the issuing of executions into such counties upon such judgments; but it was uniformly held that these provisions could not be regarded as extending the jurisdiction of the court by implication (Hicks *v.* Payson, 7 *Abb. Pr.* 326, opinion by BOSWORTH, J.; Gardner *v.* Kelly, 2 *Sandf.* 632; Blossom *v.* Adams, 7 *N. Y. Leg. Obs.* 314; Frees *v.* Ford, 6 *N. Y.* 176)..

And so it was uniformly held that a plaintiff not residing within the city of New York, who brought an action in this court, must file security for costs (Bolton *v.* Taylor, 3 *Robt.* 647). While I do not agree with these decisions, I feel bound to follow them.

Unless the new Code has changed the law, these decisions may be regarded as applicable to this appeal. The provision of the Code (§ 3,268) relating to this subject, went into effect on the first day of September last. Inasmuch as it was the law on this subject at the time the decision of this motion was made, though not at the time it was argued, it was assumed by both sides on the argument of the appeal, that the Code must be regarded as controlling, even if in conflict with the previous statutes and decisions. The provision of the Code is: "Sec. 3,268. The defendant in an action brought in a court of record may require security for costs to be given, as prescribed in this title, where the plaintiff was, when the action was commenced, either—1. A person residing without the State; or, if the action is brought in a county court, or in the marine court of the city of New York, the city court of Yonkers, or the justices' court of the city of Albany, residing without the city or county, as the case may be, wherein the court is located."

The Code, as amended in 1876 (§ 263), enlarged somewhat the jurisdiction of the superior court, as will be readily seen by comparing that section with section 33 of the old Code. Sections 263 and 3,268 would seem to indicate that the legislature meant so to enlarge its jurisdiction and powers as that the judgment of the superior court should be as effectual in any county of the State as the judgment of the supreme court, and to take this court, at least in certain respects, out of the category of local courts; inasmuch as they expressly provide that security for costs may be demanded from a plaintiff not residing in the county, who

brings his action in certain local courts enumerated in subdivision 1 of section 3,268—courts with which, in this respect, the superior court was formerly classified—thereby indicating the intention of the legislature, by not including the superior court in the provision, that hereafter any citizen of this State, no matter in what county he resides, might bring his action in the superior court of this city (provided this court has jurisdiction of the action; section 263), without filing security for costs. This seems the necessary construction of section 3268, unless such construction ought to be altered on account of the other sections of the Code which will now be considered.

The counsel for the appellant claimed that section 3,343 (subd. 1) and section 3,347 (subd. 4, 13), taken in connection with section 3,268, clearly indicated the legislative intent that a defendant in a case like that at bar should have security for costs.

"Sec. 3,343. Miscellaneous general distinctions and rules of construction.—In construing this act, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

"1. The superior city courts are, collectively, the court of common pleas for the city and county of New York, the superior court of the city of New York, the superior court of Buffalo and the city court of Brooklyn."

"Section 3,347 (under title 2, provisions regulating the effect and application of this act). The application of certain portions thereof regulated and qualified.

"The application and effect of certain portions of this act are declared and regulated as follows: Except that where a particular provision included within a chapter, or a portion of a chapter, specified in a subdivision of this section, expressly designates the courts, persons or proceedings affected thereby, that provision

is deemed excluded from the application and effect prescribed in the subdivision. . . . .

"4. The remainder of chapter 5 and the whole of chapter 6 apply only to an action commenced on or after the first day of September, 1877, in the supreme court, a superior city court, the marine court of the city of New York, or a county court. . . . .

"13. In chapter 21, titles 1, 2 and 3 apply only to an action in one of the courts specified in subd. 4 of this section."

"The remainder of chapter 5 and the whole of chapter 6," referred to in subdivision 4 of section 3,347, relate to infant parties, and to pleadings in courts of record. So that subd. 4 only means to say that the provisions of a portion of chapter 5 and the whole of chapter 6, relating to infant parties and to pleadings, shall apply to actions commenced in a superior court after the first day of September, 1877.

Subdivision 13 of section 3,347 is, that "in chapter 21, titles 1, 2 and 3 apply only to an action in one of the courts specified in subd. 4 of this section." Chapter 21, titles 1, 2 and 3 relate to costs, security for costs and fees. That is to say, subdivision 13 means that the provisions of titles 1, 2 and 3, relating to fees, costs, and security therefor, apply only to actions in the supreme court, a superior city court, the marine court of the city of New York, or a county court.

I have quoted these statutes because the bare inspection of them indicates that the claim of counsel, in regard to their effect, to say the least, does not seem to be sustained. And when they are taken in connection with the first part of section 3,347 and section 3,343, quoted above, and in connection with section 3,268, which does expressly provide in what local courts security for costs may be demanded by a defendant from a plaintiff residing without the county, it seems to be reasonably clear that there is nothing in the Code

to conflict with the ordinary and obvious construction of section 3,268, and that does not require a plaintiff to give security for costs under circumstances like the present. It may safely be granted that the provisions of titles 1, 2 and 3 of chapter 21, relating to costs, fees, and security for costs, apply to the supreme court or a superior city court (subd. 4, § 3,347), without its following, when it comes to the application, that section 3,268, under title 3 of chapter 21, should not be construed and applied according to its obvious meaning. To give the construction claimed would be to require security in the supreme court as well as in a superior city court. If there be a conflict between the obvious construction of section 3,268 and an inference which might be drawn from the subsequent sections of the Code above quoted, I should still be of opinion that the former ought to control on well settled rules in the construction of statutes. A clearly expressed intent must always govern, rather than an inference or implication.

2. The defendant having neglected for nearly a year to make this motion, though he knew that the plaintiff resided in Brooklyn—the action having in the meantime come to issue and been for many months upon the calendar for trial—I think his delay constituted such laches as to justify the court below, so far as the motion addressed itself to its discretion, in denying it (2 *Wait Pr.* 570, 572; Florence *v.* Bulkley, 1 *Duer*, 705; Swan *v.* Matthews, 3 *Duer*, 613; Robinson *v.* Sinclair, 1 *Denio*, 628; Fearn *v.* Goelpke, 13 *Abb. Pr.* 473).

The order appealed from should be affirmed, with $10 costs, and disbursements.

SEDGWICK, Ch. J., concurred.

Statement of the Case.

WILLIAM H. GARNER, APPELLANT, *v.* DARIUS R. MANGAM, ET AL, RESPONDENTS.

Order for hearing of exceptions at general term—when may be made.—Motion to vacate order—irregularity must be specified.

It is not irregularity for the trial judge at the same time that he denies defendant's motion for a new trial on the minutes, to order the exceptions to be heard in the first instance at general term, there being but one motion, viz.: for a new trial.

It seems, that a motion that the exceptions be heard in the first instance at general term, may be made after the denial of a prior motion for a new trial on the minutes upon exceptions.

Upon a motion to set aside an order for irregularity, the order to show cause must, under rule 37, specify the irregularity, even if it appear in the affidavit.

Before SPEIR and RUSSELL, JJ.

Decided November 22, 1880.

Appeal from an order made by Judge SEDGWICK, denying a motion to vacate and set aside an order made by the late Chief Judge CURTIS, directing that exceptions be heard in the first instance at the general term, and judgment on the verdict meantime stayed.

The action was tried before the late chief judge and a jury in February, 1880. The verdict was for the plaintiff. Thereupon a motion was made on behalf of the defendants, to set aside the verdict, and for a new trial upon the minutes. The hearing of this motion was set down for a later day. On the argument of the motion it would seem that the chief judge expressed his unwillingness to grant a new trial upon the minutes, but concluded that there was enough doubt in the case to justify an order that the exceptions be heard in the first instance at the general term. Although two orders were entered—one denying the motion for the new trial upon the minutes, and another directing the exceptions

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to be heard in the first instance at the general term—they were both the result of one motion, heard at one time; both bear the same date and were entered at the same time. The point presented by the appellant is, that when the judge had decided and denied the motion to grant a new trial upon the minutes, his powers, under sections 999 and 1,000 of the Code, were exhausted, and he had no authority of law then to make the order which is the subject of this appeal.

James S. Greves, attorney, and *Alexander Thain*, of counsel, for appellant, among other things, urged: —I. In actions tried before the court and a jury there are but three ways of moving for a new trial: 1. Before the trial judge, upon his minutes; or, 2. At special term, upon a case, or case and exceptions; or, 3. At general term, upon exceptions, or case and exceptions; and these motions, so far as the exceptions taken at the trial are concerned, are precisely the same, the choice being only of the forum in which the motion shall be made (*Code Civ. Pro.* §§ 999, 1,000; 3 *Wait Pr.* 420, 421, 423, 434; Morange *v.* Morris, 12 *Abb. Pr.* 164, where the practice in such cases is stated at length).

II. In the nature and design of these three remedies it clearly appears that they are alternative, not cumulative (*Graham Pr.* 638; *Laws* 1833, c. 271, § 4).

The first remedy was not known to the common law (3 *Wait Pr.* 421; Wilcox *v.* Hoch, 62 *Barb.* 509). It was created by statute, and by no correct construction of the statute had the learned justice the power, after he had heard and denied the motion for a new trial upon the exceptions, and entered an order thereon, to then direct the same exceptions to be heard, in the first instance, at the general term. As to the meaning of the phrase, "in the first instance," see Watson *v.* Scriven (7 *How. Pr.* 9); Taylor *v.* Harlow (11 *How. Pr.* 288); Morange *v.* Morris (12 *Abb. Pr.* 167); *Grah. Pr.*

637, 638; *Laws* 1833, c. 271, § 4. Clearly, from the above authorities, the exceptions taken at the trial cannot be heard and determined in the first instance before the trial judge, and also, in the first instance, at general term. This has been distinctly held by the supreme court, general term, third department, BOARDMAN and BOCKES, JJ. We quote from the MSS. opinion of BOARDMAN, J.:—"A motion was made by defendant for a new trial upon the minutes, and denied. At the same time an order was made that the exceptions should be first heard at general term. This practice is irregular, and the latter order is a nullity" (Byrnes *v.* Delaware & Hudson Canal Co., 7 *N. Y. Week. Dig.* 549).

Huntley & Bowen, attorneys, and *Richard H. Huntley*, of counsel, for respondents Mangam and Pratt.

Ernest T. Fellows, for respondent Chandler.

BY THE COURT.—HORACE RUSSELL, J.—The sections of the Code which control this matter are as follows:

"Sec. 999. The judge presiding at a trial by jury may, in his discretion, entertain a motion made upon his minutes at the same term to set aside the verdict and grant a new trial upon exceptions, or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence or contrary to law."

"Sec. 1,000. Upon the application of a party who has taken one or more exceptions, the judge presiding at a trial by jury may, in his discretion, at any time during the same term, direct an order to be entered that the exceptions so taken be heard in the first instance at the general term, and that judgment upon the verdict be suspended in the meantime. At any time before the hearing of the exceptions, the order may be revoked or modified upon notice, in court or out of court, by the judge who made it; or it may be

set aside for irregularity by the court at any term thereof."

1. It is claimed that the granting of the order that the exceptions be heard in the first instance at the general term, after denying the motion for a new trial on the minutes, was an irregularity. If it be granted that the power to grant a new trial upon the minutes and the power to direct exceptions to be heard in the first instance at the general term are not cumulative, but alternative, which is the theory of the appellant, still there was no such irregularity in regard to this motion as would justify the reversal of the order made below. It is a very common thing, on motions and on trials, for the court to refuse the relief sought and to grant other relief. And to hold that the action of the trial judge, in this case, was irregular, would be to decide that the action of judges in all such cases was irregular. In many such cases, the party moving was entitled to only one remedy, and that, perhaps, not the remedy for which he moved, or the judge had a discretion which of two remedies to grant. A motion for one remedy did not necessarily preclude the judge, in refusing that, from granting the other. Here the chief judge, upon hearing a motion for a new trial upon his minutes, simply said: "No, I will not grant that motion, I will order your exceptions to be heard in the first instance at general term." The course pursued in this case by Chief Judge CURTIS was exactly the same as that of the trial judge in Ross *v.* Harden (42 *Super. Ct.* 438).

A technical argument is made about the words "in the first instance," in which it is urged that the judge, having heard the motion upon his minutes, it was a solecism amounting to an irregularity to afterward order the exceptions to be heard "in the first instance" at the general term. This argument is based on the assumption that the words "in the first instance"

necessarily have no other meaning than "for the first time," whereas, considering the context and the effect of an order granted under section 1,000, they might well be construed as if the words were "before entry of judgment." Speaking technically, the exceptions are first heard when first made—when the objection is argued—during the progress of a trial. While, practically, a motion for a new trial upon the minutes and a motion that a judge direct exceptions to be heard in the first instance at the general term may be on the same grounds, technically they are not —at least, they are not necessarily. A motion for a new trial upon the minutes may be upon exceptions, or because the verdict is for excessive or insufficient damages, or contrary to the evidence, or contrary to the law (§ 999, Code). Whereas, upon exceptions directed to be heard in the first instance at general term, nothing else can be considered but those exceptions. On such an argument an appellant would not be permitted to present anything to the general term except what was distinctly raised by exception. He could not raise the question that the verdict was excessive or insufficient, or against the evidence. So, as it does not appear by the separate order printed in the appeal papers that the motion for a new trial upon the minutes was made only with reference to the exceptions taken during the trial, *non constat*, but that it was made on the ground that the verdict was against the evidence, or was excessive, or that it was contrary to the charge of the judge, and the denial of a motion made upon the judge's minutes upon such ground certainly would not bar the right and power to direct exceptions to be heard in the first instance at the general term. As this objection is purely technical, it must stand or fall by technical constructions. The only restriction upon the power of the trial judge to entertain a motion for a new trial upon his minutes, is that the motion shall be made

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during the term of the trial, and the only restriction made by section 1,000 upon the power of the judge to direct exceptions to be heard in the first instance at the general term, either of his own motion or on the application of a party, is that such order shall be made at the term during which the case was tried. There is nothing in the language of the Code which would prevent these motions being made separately and successively (though they were not in this case), and there was no irregularity in the trial judge's ordering the defendant's exceptions to be heard in the first instance at the general term, at the same time that he denied a motion for a new trial upon the minutes.

2. There is another ground on which the order denying the appellant's motion should be sustained. The motion to set aside was for an irregularity. The order to show cause, on which the motion was heard, did not specify the irregularity complained of, as required by rule 37. It was not sufficient that the grounds of irregularity were specified in the affidavit (Montrait *v.* Hutchins, 49 *How. Pr.*, 105).

The order appealed from should be affirmed, with costs and disbursements.

SPEIR, J., concurred.

ANDREW KNAUER, ET AL., RESPONDENTS, *v.* THE GLOBE MUTUAL LIFE INSURANCE CO., APPELLANT.

Receiver of corporation pendente lite—effect of appointment of.—Default —power of general term to direct entry of order opening.

It is not necessary that the receiver *pendente lite*, of a corporation should be substituted as defendant in an independent action brought

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against the corporation prior to his appointment, in order to enable the plaintiff therein to proceed to judgment.

Upon an appeal from an order denying a motion to open a default, the general term may, on reversal, direct the entry of such order opening the default as the special term should have granted.

In this case, the court held that the default should be opened as matter of favor, the receiver having been guilty of no laches.

Before SEDGWICK, Ch. J., and RUSSELL, J.

Decided November 23, 1880.

Appeal from an order denying a motion to open a default.

The action was begun in September, 1878, its object being to set aside an insurance policy for fraud, and to recover moneys paid on account thereof. The answer denied any fraud, and alleged that the plaintiffs acted with full knowledge of all the facts and circumstances in reference to the matters complained of. Issue having been joined, the case was on the calendar of this court at the May term in 1879, and went over at the request of plaintiffs' counsel. On the first day of June, the attorney-general, with the leave of the supreme court, began a suit to have the defendant judicially declared insolvent, and a receiver of its effects appointed. On On the 17th of June, James D. Fish was appointed receiver *pendente lite*, and duly qualified as such. This case was on the calendar in June, but was not tried on account of the illness of the judge. Being again on the calendar in October, the attorneys for the defendant notified the attorneys for the plaintiff that a receiver of the defendant had been appointed, and claimed that thereby proceedings were stayed until the receiver should be substituted as a defendant. The receiver was not substituted; but on the 17th day of October the plaintiffs took judgment by default for the sum of $1,054.07. The receiver, asserting that he had only recently heard of this judgment by default, petitioned

this court in December to open the default and allow him to come in and defend. The receiver's counsel, upon his appointment, were not the counsel of the company, but since he learned of the default in this case, he retained the counsel of the company to continue to act.

Sewell & Pierce, attorneys, and *Robert Sewell*, of counsel, for appellant.

Bushnell & Albright, attorneys, and *Samuel Jones*, of counsel, for respondents.

BY THE COURT.—HORACE RUSSELL, J.—This default seems to have been permitted in part because the defendant's attorneys believed that the appointment of a receiver of their client's property made it necessary, before plaintiffs could proceed with their action, that the receiver should first be substituted as a defendant; but more because their client's property having been taken away by the court, so that it was somewhat uncertain whether or not they would be compensated for their services, they did not choose to continue the defense until some satisfactory understanding on that point was arrived at.

1. It was not necessary that the receiver should be substituted as a defendant before the plaintiff's action could proceed to judgment. A receiver, *pendente lite*, does not absolutely, and in all respects, supersede the corporation. The corporation was *in extremis*, but it was not dead. Until it was dissolved the suit against it could proceed even to judgment (In the Matter of Waterbury, 8 *Paige*, 380; Kincaid *v.* Dwinelle, 59 *N. Y.* 552; *Potter on Corporations*, 845–847; Meckles *v.* Rochester B'k, 11 *Paige*, 118; N. Y. Marbled Iron Works *v.* Smith, 4 *Duer*, 362; People *v.* Manhattan Co., 9 *Wend.* 351; Attorney-General *v.* At-

lantic Life, 74 *N. Y.* 183). The plaintiffs' proceedings were therefore regular.

2. I am of opinion that the default ought to have been opened as a matter of favor. The defendant's attorneys were not the attorneys of the real party in interest, *i. e.*, the receiver, at the time the default was taken; and a receiver—an officer of the court—ought not to be prevented from protecting his trust on account of their mistake of or a misunderstanding with them. The answer discloses a good defense to the action. The case is peculiar in its nature and ought to be openly litigated; and whether or not the attorneys of the corporation were guilty of laches, the receiver has been guilty of none, such as to justify the court in refusing to aid his efforts to protect the property committed to his care.

The order appealed from should be reversed and the motion granted, upon the payment of the costs for the trial of an issue of fact, and the disbursements of the trial term, and also disbursements up to and including entry of judgment and the costs of opposing this motion below—the judgment to stand as security—without costs of appeal to either party. And as this court has power to make the order which the special term should have made (Griffen *v.* Helmbold, 72 *N. Y.* 437), let such an order be entered.

SEDGWICK, Ch. J., concurred.

Statement of the Case.

GEORGE S. DIOSSY, RESPONDENT, *v.* CHARLES D. RUST, APPELLANT.

Bill of particulars—when allowed.

Plaintiff having sued defendant, an attorney, for the conversion of a certain draft and the moneys collected thereon, claiming title thereto by assignment from one D., defendant in his answer alleged that the draft was received by him under an agreement with D., by which he was to collect the sum due thereon and credit D. with the net amount collected, on account of moneys which he alleged were due to him from D. for professional services and otherwise, and on account of divers contracts, &c., assumed by him for D. In another subdivision of his answer, he further alleged that said agreement having been carried out, D. had executed and delivered to him a general release of and from all claims.

***Held*, that plaintiff was entitled to a bill of particulars of defendant's first defense, notwithstanding the fact that another of the defenses relied on was a general release.**

Before SPEIR and RUSSELL, JJ.

Decided November 22, 1880.

Appeal from an order directing the defendant to serve a bill of particulars.

The plaintiff, claiming to be the owner, by assignment from one Doody, of a draft for $1,000, drawn to the order of Doody by one Patrick Brennan, upon one Henry Heyman, on November 1, 1876, and duly accepted by Heyman, sues, alleging substantially a conversion of the draft and of $800 collected upon it by the defendant, who is an attorney. The assignment of the draft to the plaintiff is alleged to have been made September 27, 1877. The defendant, among other defenses, alleges that the draft was put in his hands for collection by Doody, the owner, upon the agreement between Doody and himself that he should place the proceeds, above

Statement of the Case.

the expense of collection, to the credit of Doody, on account of divers moneys then and theretofore owing to him by Doody, and on account of contracts, liabilities and obligations then and theretofore assumed by him for Doody; that Doody was largely indebted to him for professional services (to the amount of at least $1,100). In another subdivision of his answer the defendant alleges that he having performed all the conditions on his part to be performed by said agreement, by applying the money coming to him as he was directed by his agreement with Doody, Doody released and discharged him from every obligation growing therefrom, and "growing out of any other matter or thing from the beginning of the world." The plaintiff demanded a bill of particulars. It was not furnished. Thereupon a motion was made before the late Chief Judge CURTIS for a bill of particulars, or that the answer be made more definite and certain. The order granted directed the defendant to grant a bill of particulars:

First. As to the contracts, liabilities and obligations alleged in the answer to have been assumed by the defendant for Doody, and of the moneys stated to be due from Doody to the defendant.

Second. Of the time, place and amounts of the indebtedness mentioned in the eleventh paragraph of the answer—that is, "a large indebtedness from said Doody to this defendant, and this defendant at said time was largely obligated and liable for certain matters to outside parties for said Doody."

Third. As to the moneys mentioned in the twelfth paragraph of the answer as having been paid by the defendant, &c.; and,

Fourth. As to the indebtedness for professional services.

From that order the defendant now appeals to this court.

Hall & Blandy, attorneys, and *Charles Blandy*, of counsel, for appellant.

Erastus New, for respondent.

BY THE COURT.—HORACE RUSSELL, J.—This appeal is prosecuted on the theory that, because the answer alleges a release, it cannot be material to inquire into the previous transactions between the defendant and the plaintiff's assignor, and, therefore, no bill of particulars was necessary or proper. This theory might be very well if a general release were the only defense set up by the answer (Fullerton *v.* Gaylor, 7 *Robt.* 551; Powers *v.* Hughes, 39 *Super. Ct.* 487; Watts *v.* Watts, 2 *Robt.* 685; Gee *v.* Chase Mfg Co., 12 *Hun*, 630; Drake *v.* Thayer, 5 *Robt.* 701).

But it is not the only defense. The answer here sets up other defenses, which are very general and indefinite. As to them a bill of particulars was properly ordered (Beecher *v.* Tilton, 59 *N. Y.* 176, and cases above cited).

The order is affirmed, with $10 costs, and disbursements.

SPEIR, J., concurred.

Statement of the Case.

THE ATLANTIC & PACIFIC TELEGRAPH COMPANY, APPELLANTS, *v.* THE BALTIMORE & OHIO R. R. COMPANY AND THE AMERICAN UNION TELEGRAPH COMPANY, RESPONDENTS.

I. ACTIONS, LOCAL AND TRANSITORY.

1. DISTINCTION BETWEEN.

Actions are local when their cause is in its nature local, and transitory when the transactions on which they are founded might have taken place anywhere.

(*a*). *Equitable jurisdiction.* The distinction in no way depends on the character of the action as being one of common law or equitable jurisdiction.

1. *Local actions, numerous instances of given.*

1. Equitable action, when not local, see *infra.*

II. JURISDICTION OVER SUBJECT MATTER, AS DEPENDING ON THE CHARACTER OF THE ACTION, WHETHER LOCAL OR TRANSITORY.

Courts of one State or country have no jurisdiction over an action, the cause whereof is in its nature local in another State or country.

(*a*) *Section* 427 of Code of Procedure *and section* 263 of Code of Civil Procedure, providing for actions against foreign corporations, *effect of.*

Do not give jurisdiction over an action the cause whereof is in its nature local in another State or country.

(*b*) EQUITABLE ACTIONS WHEN NOT LOCAL.

1. When the court, acting on the person, *compels* a thing to be done (which could be done anywhere), though the doing of the thing might produce effects and results in a state, &c., other that in which the court had jurisdiction, or though the inquiry as to whether the doing of the thing should be compelled or not involves a question as to the title to lands situate in another jurisdiction, the solution of which may even constitute the essential point on which the case depends, the action is not local.

So also where the court, acting on the person, *enjoins* the doing of certain acts in the State in which it has jurisdiction, although such injunction may prevent the doing of certain acts in another State (which could not be directly

Statement of the Case.

enjoined against by it), which would otherwise have taken place as resulting from the act enjoined against, the action is not local.

III. APPLICATION OF ABOVE PRINCIPLES.

An action was brought by a domestic corporation against two defendants,—one a domestic corporation and one a foreign corporation, having an office and agency and doing business in this State,—for an accounting by the foreign corporation, under a contract alleged to exist between it and the plaintiff, to restrain it from an alleged unlawful interference of certain rights claimed by the plaintiff under the alleged contract, which interference consisted in part of threatened acts, which could only be done in another State, and in part of a combination with the other defendant, undertaken to be consummated in this State, with the view of ousting the plaintiff from its claimed rights and vesting them in such other corporation, and of acts done here directing, or which would result in, the doing of the threatened acts in the other State. Held,

1. No JURISDICTION over subject matter.

   The courts of this State had no jurisdiction to restrain the doing of the acts threatened to be done in the other State; nor, if they have been done, to compel the undoing of them and restoration of things to their former condition.

2. JURISDICTION OVER SUBJECT MATTER.

   The courts of this State have jurisdiction over the action so far as to compel an accounting, and to restrain the doing of the acts threatened to be done in this State.

IV. JURISDICTION OVER PERSON.

1. As TO FOREIGN CORPORATIONS.

   (*a*) Personal service on its president, in the city of New York, of the summons gives such jurisdiction.

   1. In such case *it is not necessary* either that an attachment should have been levied on the property of the corporation, or that the corporation should have property in the State, or that the cause of action should have arisen in the State.

      1. An exhaustive summary of the common law and statutory provisions relative to bringing parties into court is given.

V. SERVICE OF SUMMONS, SETTING ASIDE; WHEN NOT; ACCESS OBTAINED BY TRICKERY.

1. Where a party legitimately and voluntarily comes within the territorial jurisdiction of the court, not having been induced to do so by fraud, trick or device, the fact that *access to him is by such means obtained* furnishes no ground for setting aside the service.

Statement of the Case.

VI. SPECIAL TERM ORDER—WHAT IS NOT.

1. *Caption* does not necessarily make an order a special term one.
   1. If it is signed by the judge with his full name, with no directions to enter it, *and it is not entered, it is a judge's order*, and not a special term order, although it has a caption.

VII. INJUNCTIONS.

1. OMISSION TO STATE GROUNDS OF, EFFECT OF.
   1. It is not a *jurisdictional* defect. It is only an irregularity, for which the injunction may be set aside.
      1. *Disregarding.* If no substantial right of the defendant has been violated, it may be disregarded or supplied under section 723 Code Civil Procedure.

2. TO PREVENT TAKING POSSSESION OF PROPERTY WITHOUT PREVIOUS PAYMENT.
   1. Where one puts improvements and erections on the land of another under a joint arrangement, one of the details of which is, that the one on whose land the improvements and erections are placed may, at his option, terminate the joint agreement and become the sole owner and possessor of the improvements and erections, upon making compensation therefor, and it appears that the owner of the land is about to take possession and exclusive control without making compensation, and it also appears that the taking of such possession and exclusive control without making compensation at the same time would produce irreparable injury to the other party, a case is presented for the equitable relief of injunction to be exercised by the court having jurisdiction of the subject matter.

   Compelling a resort to the courts.

      1. An injunction will often be granted to restrain a party from deciding for himself a question involving controverted rights, *and to compel him to resort to the courts*, and this without regard to the absolute merits of the controversy.

3. DISOBEDIENCE OF.
   1. *Who may be punished for.*
      1. A corporation may be.
      2. All persons bound to obey it who have aided, abetted or countenanced others in violating it.
   2. *Excuse for disobedience, what not.*

      That the injunction is *too broad*, and restrains the doing of acts which the *court has no jurisdiction* to restrain, as well as acts over which the court has jurisdiction, is no excuse for the violation of the injunction by the doing of the acts over which there is jurisdiction.

Statement of the Case.

VIII. CONTEMPT PROCEEDINGS.

1. Order dismissing a motion to punish for contempt in not obeying injunction.

1. REVERSAL OF BY GENERAL TERM.

1. *Proper directions to be given.*

Where there is evidence tending to show a violation of the injunction, but the general term is not in possession of all the facts, and the proof before the court is not as full or explicit as it evidently could be made, the proper course to pursue is for the general term to order that an attachment issue against the accused parties, bailable in a sum sufficient to secure his attendance hereafter, that interrogatories be filed and served touching the alleged contempts; that the accused party be required to make written answers thereto, and that it be referred to a referee to examine them on oath, upon the said interrogatories, and to take such further proofs as either party may produce before him touching the alleged contempts, and to ascertain what injury, if any, the plaintiff sustained in consequence thereof, and the extent thereof, and that he report such answers and proofs to the court, with his opinion thereon, and that, upon the coming in of said report, either party may, on eight days' notice, move at special term for the proper order and adjudication thereon, and that for these purposes the case be remitted to the special term.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided December 6, 1880.

Appeal from order setting aside and declaring void summons, complaint, and order of injunction, and the service thereof on the defendant, the Baltimore & Ohio R. R. Co.

Also, appeal from order dismissing plaintiff's motion to continue injunction and to punish the Baltimore & Ohio R. R. Co. and John W. Garrett for contempts; vacating order bringing in the American Union Telegraph Co. as a party defendant and authorizing supplemental summons and complaint; vacating order of injunction granted against it; and dismissing supplemental summons and complaint.

Statement of the Case.

This action was commenced on Saturday, February 28, 1880, against the Baltimore & Ohio R. R. Co., as sole defendant, and on said day the plaintiff procured an order, returnable on the 5th of March, 1880, enjoining and restraining the Baltimore & Ohio R. R. Co., its officers, attorneys, agents, servants, and workmen from interfering with, or taking possession of, any lines of telegraph or telegraphic wires then belonging to or operated by the plaintiff, or from interfering with or preventing the workmen of the plaintiff from repairing or maintaining the same, or any of them, or from cutting or disturbing any of the said wires, whether on the lines of railway belonging to the Baltimore & Ohio R. R. Co., or operated or managed by it, or in connection with its own railway.

It was also further ordered that the Baltimore & Ohio R. R. Co. show cause on March 5, 1880, why the injunction should not be continued until the final decision of the action, and why the plaintiff should not have such other order as may be just.

A copy of the summons, complaint, injunction, order and affidavits, was delivered to John W. Garrett, the president of the Baltimore & Ohio R. R. Co., on February 28, 1880, at the city of New York.

On Sunday, February 29, 1880, and the day following, wires of the plaintiff on the said defendants' railroads having been cut in Washington, Penn., and Columbus, Ohio, and plaintiff's connection in the defendants' depot at Washington, D. C., having been broken, the plaintiff, on March 1, obtained an order to show cause, returnable at the same time as the original order, why the said defendant and John W. Garrett should not be punished for contempt of the injunction already referred to.

On the same day an order was made, bringing in the American Union Telegraph Co. as a party defendant, and allowing the plaintiff to make and serve supple-

mental complaint. This was on the ground that, before the suit was brought, that company and the railroad had made a contract in the city of New York, by which the railroad company agreed to deliver possession of the plaintiff's lines of telegraph on said defendants' railroads to the American Union Telegraph Co. for a valuable consideration, and by which the latter agreed to indemnify the railroad company against any suits brought by the plaintiff. These facts did not come to the plaintiff's knowledge till after the suit was brought.

On March 3, 1880, on the verified complaint and the verified supplemental complaint, the affidavits already served, and certain additional affidavits, an additional order was made, that the defendants, the Baltimore & Ohio R. R. Co. and the American Union Telegraph Co., and the officers, attorneys, servants, agents and workmen of each of said companies be, and they were thereby, enjoined and restrained until the further order of this court, from directly or indirectly interfering with or taking possession of any lines of telegraph or telegraphic wires heretofore operated by the plaintiff along or upon any of the lines of railway belonging to the Baltimore & Ohio R. R. Co., or operated or managed by it, or in connection with its own railway; or from preventing the plaintiff from operating the same in connection with its other lines.

And it was further ordered that the defendants show cause why the said injunction should not be continued until the final decision of, and judgment in, the action, and why the defendants and each of them should not be ordered and decreed to deliver up possession to the plaintiff, of each and all of the lines of telegraph and telegraphic wires heretofore operated by the plaintiff along said lines of railway, or any of them, and why the plaintiff should not have such other order as might be just, with costs.

Statement of the Case.

March 5, 1880, when the order to show cause upon the original injunction against the railroad company was made returnable, its attorney, for such purpose, applied for and obtained a stay of proceedings, with an order to show cause why the said paper, purporting to be a summons, an injunction and complaint, and the alleged service thereof, should not be set aside and declared void on the following grounds:

"I. That the alleged service of each of the papers was not valid, because access to Mr. Garrett was obtained by fraud, trick and device.

"II. That the court did not acquire jurisdiction over the defendant by the delivery of a summons to Mr. Garrett.

"III. That the alleged service of the order for an injunction was not valid, because the alleged order purports to be a special term order, and a certified copy thereof was not delivered to the said Garrett.

"IV. That if the order were to be regarded as the judge's order, it was not duly served, because the signature of the judge was not shown, as required by the Code.

"V. That the injunction itself is defective and void, and that it does not recite the grounds for the injunction.

"That it is apparent upon the face of the papers that the court has not jurisdiction of the case."

The court adjourned the hearing of plaintiff's motions to March 9, 1880. On that day the motion of the Baltimore & Ohio R. R. Co. was heard, and plaintiff's motions were adjourned to March 13, 1880.

On March 13, 1880, the motion of the Baltimore & Ohio R. R. Co. to set aside the summons, complaint and injunction, and the service thereof, was granted, and the said summons, complaint and injunction, and the service thereof, were set aside and declared void. At the same time the motions of the plaintiff were dis-

missed, and, on motion of the attorney for the American Union Telegraph Co., the injunction granted March 3, 1880, and the order bringing in said company as a party defendant and for a supplemental summons and complaint, were vacated, and the said supplemental summons and complaint were dismissed.

McDaniel & Souther, attorneys, and *Joseph H. Choate* and *Everett P. Wheeler*, of counsel, for appellant.

Charles F. Bauerdorf, attorney, and *David Dudley Field*, *Dudley Field* and *William Dorsheimer*, of counsel, for respondents.

FREEDMAN, J.—The learned chief justice who determined these motions and made the order appealed from, deemed it unnecessary to consider the technical objections advanced by the railroad company, but placed his decision upon the ground that the examination of the causes cited on the hearing had failed to satisfy him that, where the cause of action has reference to the obligations and business of a corporation created and conducting its business in another State, and where the relief is of the character sought in this action, this court has jurisdiction, or that such jurisdiction can be obtained by the steps or proceedings taken by the plaintiff in this action. In other words, the decision went upon the ground that the railroad company being a foreign corporation, the courts of this State neither have jurisdiction of the subject matter of the action, nor can they obtain jurisdiction by the service of process upon the president of the company.

As to the jurisdiction of the subject matter.

The distinction between local and transitory actions has always been recognized by the best elementary writers. The distinction taken is this, that actions are

deemed transitory, where the transactions on which they are founded might have taken place anywhere, but are local where their cause is in its nature local.

In the case of Livingston *v.* Jefferson (1 *Brockenb.* 203), which was *quare clausum fregit* brought against a former president of the United States for removing the plaintiff from the Batture in New Orleans, the suit was instituted in the circuit court of the United States for the district of Virginia, in which district the ex-president resided, and the sole question presented for consideration was, whether such an action could be sustained out of the territory where the alleged injury to the real estate was committed. Chief Justice MARSHALL enforced the distinction between transitory and local actions, as stated above, and held that, although the distinction was merely technical, where the action was instituted to recover damages from the person who had done the local injury, and not to recover the property, which had a fixed locality, the law was too well settled to allow it to be changed by the courts.

The distinction made has also been recognized by the courts of this State.

Watts *v.* Kinney (6 *Hill*, 82), was an action on the case for an injury to real property in New Jersey, by diverting water from the plaintiff's mill, and the action was held to be local, not only by the provisions of the Revised Statutes, but also by the settled rule of the common law, and therefore not within the jurisdiction of the courts of the State of New York.

In People *v.* Central R. R. Co. of New Jersey (42 *N. Y.* 283), it was decided that the courts of the State of New York have no jurisdiction to restrain the erection or order the removal of structures extending into the bay or river from the Jersey shore, even if they are a public nuisance, and notwithstanding the fact that, pursuant to an agreement or treaty made between the States of New York and New Jersey in 1833, the State

of New York has exclusive jurisdiction over the waters, to low water mark, on the New Jersey shore, and over ships, vessels and craft of every kind afloat in the bay of New York and Hudson River, south of Spuyten Duyvil Creek, for quarantine or health purposes, the protection of passengers and property, to secure the interests of trade and commerce, and to preserve the public peace.

Chase *v.* Vanderbilt (37 *N. Y. Super. Ct.* [5 *J. & S.*] 334), presented, on demurrer, a controversy between stockholders and the directors of the company, a foreign corporation, as to the management of the internal affairs of the company, and it was held that so far as the plaintiff's right to any judgment involved the performance of an act to be done by the corporation, in its corporate capacity, in a foreign State, it was a matter not in the jurisdiction of the courts of this State, and that such jurisdiction could not be obtained by acting on its directors.

In the case of American Union Telegraph Co. *v.* Middleton (decided by the Court of Appeals in March, 1880), the action was brought to recover damages for wrongfully and maliciously cutting down and unlawfully carrying away and converting twenty-three telegraph poles, wires and insulators attached thereto, located in the State of New Jersey, and forming a part of a continuous line of telegraph in operation in that State. An order of arrest was granted, the defendant held to bail, and a motion to vacate was denied. The defendant appealed to the general term, where the order was affirmed, and an appeal taken to the court of appeals. The question presented was, whether an order of arrest can be lawfully granted in such a case. The court of appeals held: "The telegraphic poles, with wires and attachments thereto, which, it is alleged, were cut down by the defendant, were affixed to the soil, and constituted a part of the freehold (Electric Telegraph

Co. *v.* Overseers, 24 *L. J. N. S.* 146). As they could not be cut down without an entry on the realty, and this constitutes a material part of the damages, the only action which can properly be brought is an action of trespass *quare clausum fregit.* This is clearly manifest, and as such action is local in its character, by the statute as well as by the common law, it will not lie in this State where the land is located in another State (Watts *v.* Kinney, 23 *Wend.* 484). In the case last cited it was held that although the courts will entertain actions which are in their nature transitory, notwithstanding they arise abroad, actions for trespass *quare clausum fregit*, ejectment, &c., where the land lies in a foreign country, cannot be tried here. It is claimed that the damage to the real estate is not the cause of the action, and as these tortious acts were committed upon the highway where the defendant had a right to be, there could be no trespass on the close. The answer to this position is, that the plaintiffs had affixed their poles to the realty, and the cutting away of the same was a trespass, for which damages could only be recovered by an action *quare clausum fregit.*"

The distinction between transitory and local actions in no way depends upon the difference between equitable and common law jurisdiction. The cases of People *v.* Central R. R. Co. of New Jersey (42 *N. Y.* 283), and Northern Indiana R. R. Co. *v.* Michigan Central R. R. Co. (15 *How. U. S.* 233), leave no doubt that whether the relief sought be at law or in chancery, the question of jurisdiction equally applies. Nor can this question of jurisdiction be entirely overcome by a literal construction of section 427 of the old Code, which is still in force, and of section 263 of the Code of Civil Procedure, which provide that an action against a foreign corporation may be brought by a resident of this State, or a resident within the territorial jurisdiction of any of the superior city courts, for any cause of action.

The words, "For any cause of action," must be deemed to mean any cause of action within such jurisdiction of the court as the State has power to confer, and actually has conferred, upon it.

But while the distinction between transitory and local actions has always been maintained, cases have arisen in which the courts felt bound to exercise jurisdiction, though the ostensible object of the action was to work results out of their territorial jurisdiction, and though, for that reason, the action seemed to partake somewhat of the characteristics of a local action. Nearly all, if not all, these cases arose in equity. Of course, the action had to be strictly against the person of the defendant, and the court had to acquire jurisdiction of the person by the service of process within its territorial jurisdiction, and the judgment prayed for had to be one which was enforceable against the defendant within such territorial jurisdiction. But where these elements concurred, and the cause of the controversy was not in its nature necessarily local (as it is in actions of ejectment, trespass *quare clausum fregit*, waste, the prevention or abatement of a nuisance, &c., &c.), and especially where the defendant in the action was liable to the plaintiff, either in consequence of contract, or as trustee, or as a holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the courts did not hesitate to hold that the principles of equity gave to the court jurisdiction wherever the person might be found, and that the circumstance that a question of title might be involved in the inquiry, and might even constitute the essential point on which the case depends, was not sufficient to arrest jurisdiction (Gardner *v.* Ogden, 22 *N. Y.* 327, and cases there cited).

Thus, to cite only a few instances in Gardner *v.* Ogden, the court of appeals of New York affirmed

the judgment of the supreme court compelling a reconveyance by the defendant of lots in Chicago, Ill.

In the case of Penn *v.* Baltimore (1 *Ves.* 444), Lord HARDWICKE, of the English court of chancery, decreed specific performance of articles settling the boundaries of the Colonies of Maryland and Pennsylvania, made and executed between the respective proprietors thereof.

In Massie *v.* Watts (6 *Cranch*, 148), the supreme court of the United States sustained the decree of the circuit court of Kentucky against the defendant, to compel him to convey to the plaintiff lands in the State of Ohio, to which the defendant had obtained the legal title, but to which the plaintiff claimed to be equitably entitled.

In Muller *v.* Dows (94 *U. S.* [4 *Otto*] 444), the supreme court of the United States even affirmed in full the decree of the circuit court of Iowa, directing a foreclosure of a mortgage on the entire railroad and franchises of the Chicago and Southwestern Railroad Company, and ordering a sale of them, though part of the property ordered to be sold was situate in the State of Missouri, and consequently outside of the territorial jurisdiction of the court.

In the case at bar, the plaintiff, the Atlantic and Pacific Telegraph Company, and the defendant, the American Union Telegraph Company, are each a corporation incorporated under the laws of the State of New York, and having its principal place of business in the city of New York, and consequently, each of them is not only a resident, but also a citizen of the State of New York, and under the provisions of section 264 of the Code of Civil Procedure, each of them is also a resident of the city of New York. The Baltimore and Ohio Railroad Company is a corporation incorporated under the laws of the State of Maryland, and has its principal place of business in the

city of Baltimore, in the said State of Maryland, and is to be treated, therefore, as a foreign corporation, though it also has, as has been shown, an office and place of business in the city of New York.

The facts which stand substantially admitted, are: In 1875, the plaintiff, with the knowledge and consent of the Baltimore and Ohio Railroad Company, put up a line of poles on the said defendant's railroad from Wheeling, in the State of Virginia, to Columbus, in the State of Ohio, and subsequently continued this line from Wheeling to Washington, Pennsylvania, and strung on these poles three wires, which it connected at the Pennsylvania terminus with its other wires, which extended from that place to this city, and from this city to various points in the United States and Canada. Early in 1877, the plaintiff strung a wire on said poles along said railroad from Washington, D. C., to Parkersburg, Virginia, and this was connected with plaintiff's line from Washington to New York. In 1877, the plaintiff, with the consent of the said defendant, strung a wire on the said poles along said railroad, from Chicago Junction, Ohio, to Chicago, Ill., and this wire was also connected with the plaintiff's other wires just mentioned. In this way the plaintiff's wires along defendant's railroads became part of the plaintiff's general system of telegraph which has its center in this city, and formed a very important and material part thereof.

Beyond the facts stated, as to which there is no controversy, the plaintiff claims that the poles and wires mentioned were erected by the plaintiff under certain agreements between the plaintiff and the railroad company, and the action is brought in equity to restrain the defendants from interfering with the plaintiff's right under said agreements to use the said

poles and wires, and also for an accounting as to certain receipts.

On the hearing below, there was a dispute as to the nature and terms of the agreements upon which the plaintiff relies, and the principal matters in difference between the parties in this respect may be stated as follows:

1. The plaintiff claims that a formal written contract was made and executed by it, and sent to the railroad company, under which the plaintiff had an absolute and permanent right to continue the lines of poles and wires from Washington, Pennsylvania, to Columbus, Ohio. The railroad does not deny that it received this contract, duly executed by the plaintiff, but it does deny that it ever accepted the same.

2. The plaintiff admits that as to the other lines of telegraph, the railroad company had the right to acquire ownership of them, and to exclude the plaintiff from their use upon giving the plaintiff one year's notice of its intention so to do, and paying the plaintiff the cost thereof. The said defendant claims that it had the right to take possession of all the lines without giving the plaintiff any previous notice, and without paying anything to the plaintiff, but subject to an accounting between them as to various matters growing out of their previous business relations.

3. The plaintiff also claims that the agreement provided for a division of the receipts for messages delivered to the plaintiff at its different offices on the said defendant's roads, in certain varying proportions not material here to be stated; that most of these receipts the Baltimore and Ohio Railroad Company retained; and that there should be an accounting as to them.

The object of the action, therefore, was to restrain an alleged unlawful interference by the defendants with certain rights, claimed by the plaintiff under a

contract with one of the defendants, and to have an accounting. In this aspect, the action, as brought, is not necessarily, in its entire scope, a local one, within the true and established meaning of that term, and the question of jurisdiction in that respect, may depend as much, if not more, upon the nature and character of the interference complained of, whether threatened or actual, and upon the place where planned or about to be planned, than upon the locality in which it is to be carried out. In other words, where the complaint as a pleading is in general terms, which are not necessarily inconsistent with jurisdiction, the question of jurisdiction, so far as it relates to the subject-matter, depends upon the proof, and not upon the pleading. Under the former practice, it sometimes happened that a place was, contrary to the real fact, described under a *videlicet* which brought it within the local jurisdiction. In such a case, a demurrer was not the proper remedy, but the defendant had to take the objection at the trial, when the plaintiff failed to show the *locus in quo* to be within the territorial jurisdiction.

Now, the plaintiff complained, that in violation of existing agreements, the defendants threatened to deprive it, and were about to deprive it, of the use of certain specified lines of wires; that the principal part of the benefit and advantage derived by the plaintiff from the agreements aforesaid, and the principal consideration moving to it in and from the same, consisted in the connections which the plaintiff is, by means of said agreements, enabled to make between its other lines of telegraph and the specific line in controversy; that the aggregate business done by the plaintiff in the transmission of telegraphic messages is largely dependent upon its ability to transmit messages upon said last-mentioned lines in connection with its other lines; that the interruption of such connections would

not only deprive it of the ability to transmit telegrams to many of the cities upon the lines of telegraph upon the railways owned or controlled by the Baltimore and Ohio Railroad Company, but would also injuriously affect its other business, and would give an advantage to other and competing lines of telegraph; that it would be impracticable to keep an account of, or ascertain the precise amount of such injury to plaintiff; and that for these reasons, unless the defendants were restrained, the plaintiff would not only sustain an irreparable injury, but one that could not be compensated in damages. So far, therefore, the plaintiff shows a cause of action which calls for equitable relief.

Moreover, the origin of all interference apprehended and threatened, according to the proofs submitted on the hearing of the motions, consisted of a combination, entered into and about to be consummated, between the defendants in the city of New York, pursuant to which the plaintiff's wires upon and along the railroads controlled by the railroad company were to be forcibly taken from the plaintiff and to be turned over to the American Union Telegraph Company, and pursuant to which the orders necessary for the accomplishment of these purposes were to be sent from the city of New York.

That this combination existed, that its objects and purposes were as stated, and that decisive measures to secure such objects and carry out such purposes were about to be taken, was conceded by Charles A. Tinker, the superintendent of the telegraph department of the railroad company. In his affidavit, made on behalf of said company, and sworn to March 4, 1880, he testified as follows, viz.:

"The President of the Baltimore and Ohio Railroad Company being in New York, during the last week in February, on business connected with the

trunk lines, I went thither on the night of the 26th ultimo, taking with me the contract between the Baltimore and Ohio Railroad Company and the American Union Telegraph Company, and consequent notice to the Atlantic and Pacific Telegraph Company of the termination of all arrangements with it, both of which awaited his signature. The contract to which I referred was signed by the contracting parties on Saturday, the 28th of February, and the notice to the Atlantic and Pacific Telegraph Company was immediately thereafter signed by the president of the railroad company. I went, as promptly as possible, to the office of the Atlantic and Pacific Telegraph Company, and delivered to M. Chandler, the president, the notice which had been signed by the president of the railroad company, a copy of which is filed in the cause. This took place at about fifteen minutes past four o'clock P. M., on the 28th ultimo."

The affidavit of John W. Garrett, the president of the railroad company, sworn to March 4, 1880, contains a similar admission. In it Mr. Garrett says:

"I was at the time (referring to February, 1880) engaged in negotiations with the American Union Telegraph Company, looking to a co-operation arrangement between the company and the Baltimore and Ohio Railroad Company, which, when made, necessitated a full possession of all the lines of telegraph upon the Baltimore and Ohio Railroad and connections. The formal contract was being prepared, and I anticipated its execution within the month of February, so that the 1st of March was the latest period to which I could extend the time for coming into possession of these lines. I was in New York on the 26th, 27th, 28th and 29th of February, to attend a meeting of the presidents of the trunk lines, and to other business there. Mr. Tinker came to New York on the 27th ultimo, bringing with him the contract with the American

Union Telegraph Company, and the notice to the Atlantic and Pacific Telegraph Company, which had been prepared at Baltimore for my signature. After executing the former paper, on the 28th ultimo, I signed also the notice to the Atlantic & Pacific Telegraph Company, above referred to, and instructed Mr. Tinker to deliver the same to the president of that company."

In view of these circumstances the contention of the defendants that a foreign corporation can, through its authorized agents, do such things in the State of New York, without being subject to our laws or amenable to our courts, and that, even if the commission of such acts involves a gross violation of contract obligations against our citizens, redress can only be obtained by going to the jurisdiction in and under which it was and is incorporated, cannot be sustained.

True, a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created, and it must live and have its being in that State only.

It is by the law of comity among nations, that a corporation created by one sovereignty is permitted to make contracts in another, and the same law of comity prevails among the several States of the Union.

But while a corporation does business in a State other than the one by which it was created, it is subject in all respects to the laws of such State; for its franchise is a special privilege conferred upon it by the State that created it, and not one which belongs to the citizens of this country generally, of common right.

Thus, in Lafayette Ins. Co. *v.* French (18 *How. U. S.* 404), where a corporation chartered by the State of Indiana was allowed by the law of Ohio to transact business in the latter State, upon condition that service of process upon the agent of the corporation should be considered as service upon the corporation

itself, it was held that a judgment against the corporation, obtained by means of such process, ought to have been received in Indiana with the same faith and credit that it was entitled to in Ohio; that the State of Ohio had a right to impose such a condition; and that when the company sent its agent into that State, it must be presumed to have assented to the rule.

Upon the same reasoning the jurisdiction of the supreme court of the District of Columbia was sustained in Baltimore & Ohio R. R. Co. *v.* Harris (12 *Wall.* 65), over an action to recover damages for personal injuries sustained in consequence of a collision which occurred in the State of Virginia.

In this connection it should also be noticed that the Baltimore and Ohio Railroad Company, though it disclaims that it has a railroad belonging to it or under its control in this State, was shown to do a regular business and to have property here. It has offices in this city, with signs displayed thereon, for the sale of passenger tickets, and for making contracts to carry freight. It occupies a pier in this city, with its name conspicuously displayed thereon, for handling freight. It makes contracts here for the carriage of passengers and freight from this city to Baltimore and Chicago, and other points in the West. It also runs through cars between Baltimore and Boston. In doing so, the cars are placed on board of a boat at Jersey City, passed through the harbor of New York and the East River, and landed on a pier on the north shore of the Harlem River, where they are transferred to a connecting railroad. The trunk lines referred to in the affidavits of Tinker and Garrett, on the business of which the latter had come to New York, were shown to be the lines of transportation from the city of New York to the West, of which the Baltimore and Ohio Railroad is one. These facts establish affirmatively that the said company has property within the State against

which the judgment and orders of the court can be enforced.

It was not contended by the defendants, either at special term or upon the argument of the appeals, that there was any reason why this action, if maintainable at all in this State, might not be maintained in this court, as well as in the supreme court. It is hardly necessary, therefore, to refer upon this point to the case of People *v.* Green (58 *N. Y.* 303), in which it was held that the statute extending the jurisdiction of this court to any cause of action is constitutional, provided service of process is made within the limits of the city of New York.

In view of the principles settled in the cases hereinbefore referred to, I am satisfied, upon the point so far considered, that in so far as the object of the action is to restrain the defendants from taking possession of the plaintiff's wires and poles, which, if not real estate, are fixtures, for the purposes of this controversy, the action is a local one, within the true and established meaning of that term, and that no court of this State has jurisdiction to grant, by judgment or order, such injunctive relief, because no part of the property is within the territorial jurisdiction of the State. For the same reasons, no court of this State can, in view of the allegations of the supplemental complaint, to the effect that the defendants did take possession, decree, by judgment or order, a restoration of the possession to the plaintiff. No court has yet gone to the extent of immediately acting upon the actual possession of property which is beyond its territorial jurisdiction and the reach of its final process. This point has been fully discussed by Judge SEDGWICK, and I cordially concur in his views upon it. But the question of jurisdiction in this case, as it stands at present, is not wholly disposed of by the fact that the complaint or supplemental complaint, or both together, asked too

much, and that the injunction orders, as granted, were too broad. As to the accounting prayed for, the action is well brought and within the undoubted jurisdiction of the court. So, under the prayer for an injunction against all interference, direct and indirect, with plaintiff's rights under its contract with the railroad company, and for such other and further relief as may be proper, the court, upon the proofs before it, has the power to grant relief against the operations carried on by the defendants to plaintiff's prejudice in the city of New York, for it appears that the consummation of the scheme between the railroad company and American Union Telegraph Company was imminent at the time of the commencement of the action, and did take place in the city of New York, subsequent to the service of process upon the president of the railroad company, and that, in pursuance of such consummation, the orders necessary for the accomplishment of the purposes of the defendants were sent from the city of New York. Such a limitation of the scope of the action may, or may not, necessitate an amendment of the pleadings, but it does not affect the question of jurisdiction. As long as jurisdiction attached for any purpose, the plaintiff should not have been wholly turned out of court, but the defendants should have been left to plead by answer the alleged want of jurisdiction as to the remaining matters.

My conclusion therefore is, that the court below, provided it acquired jurisdiction of the person, had jurisdiction of the subject-matter of the action to a sufficient extent to grant to the plaintiff some sort of injunctive relief, and that consequently there was jurisdiction to grant a preliminary injunction. The question whether, after argument, the injunction as granted should have been retained, modified or vacated, will be considered hereafter.

Having reached the conclusion stated, it becomes

material to determine, as the next question, whether jurisdiction of the person was acquired.

As to the jurisdiction of the person.

That the person proceeded against must be within the jurisdiction of the court entertaining the cause of action, seems to be as well settled as a general principle of international law, as the principle that in a proceeding *in rem* the court must have jurisdiction of the thing proceeded against. But nearly all governments have found it necessary to authorize their courts, in the administration of justice, to entertain jurisdiction to some extent over non-residents and absentees from their territory. A due regard for the welfare of their own citizens, whose rights of property or person, it is agreed, should not be impaired by the absence of persons who may be interested with, or related to them, is offered as a justification for the practice.

Process at the common law had to be served upon the person of the defendant. If he failed to appear in court, in obedience to the verbal warning of the sheriff holding the original writ, writs of attachment issued from the court, commanding the sheriff to attach him by taking certain of his goods, which should be forfeited if he did not appear. If after this he neglected to appear, writs of distress issued from time to time, till he was stripped of his goods and profits of his lands, which all became forfeited to the king. Here the process ended in cases of injuries without force, until the enactment of statutes, which allowed a capias for his person in actions of account, detinue, and case, in like manner as it had before been used in actions for injuries accompanied with force. If he could not be found upon the return of this writ, the suit was at an end (3 *Blacks. Comm.* 283, 284). The proceedings of outlawry which followed at the option of the plaintiff, resulted in a general forfeiture of his property to the king, from whom the plaintiff, on peti-

tion to the court of exchequer or lords of the treasury, could obtain the satisfaction of his demand. But he was left without judgment upon his claim and the satisfaction of it was limited by the value of the property found.

Nearly the same strictness prevailed in the court of chancery until the enactment of modern statutes. It was a rule in equity that all persons legally or beneficially interested in the subject-matter of a suit, should be made parties, and if such a person was absent, it was usual to state his name and pray process against him when he came within the jurisdiction. In the reign of George II. the court of chancery was authorized to commence and proceed to final judgment against a subject of the kingdom, who had withdrawn or absconded from his usual place of abode, for the purpose of evading process (5 Geo. II. c. 25). Notice of the suit had to be inserted in the London Gazette, and posted in some public place at the Royal Exchange. This statute was repealed by 11 Geo. IV. and 1 Will. IV. c. 36, in which, however, the provisions relating to process by constructive notice were re-enacted (11 Geo. IV. and 1 Will. IV. c. 36). These statutes have probably been the basis of the laws authorizing service of process by publication in different States of the United States.

In Tennessee (*Code of Tenn.* [1858], p. 779), Mississippi (*Rev. Code* [1857], p. 545), North Carolina (*Rev. Code* [1854], p. 188), Vermont (*Comp. Laws* [1850], p. 210), Illinois (1 *Ill. Stat.* [1863], p. 139), Arkansas (*Ark. Dig. of Stat.* [1846], p. 227), and Colorado (*Laws of Colorado* [1861–1862], p. 183), suits in chancery may be maintained against non-residents upon constructive service of process by publication.

Actions at law may be brought in certain cases upon like service of process in Minnesota (*Stat.* [1851], p. 335), Kansas (*Comp. Laws* [1862], p. 163), Ne-

braska (*Laws Nebraska* [1857–1859], p. 119), Iowa (*Rev. Laws* [1860], p. 501), Ohio (2 *Rev. Stat.* [1860], p. 964), Wisconsin [*Rev. Stat.* [1858], p. 719), and New York (*Code* of 1848 and acts amendatory thereof).

In Indiana (2 *Stat. Ind.* [1860], p. 64), California (*Comp. Laws* [1850–1853], p. 524, § 30), Kentucky (*Stanton Code Pro.* p. 52, § 88) and Maine (*Rev. Stat.* [1857], p. 499, § 24), actions at law may be maintained against non-residents upon constructive service of process by publication or such mode as the court may order.

Of course none of the statutes referred to can go further than to confer, upon the service thus made, jurisdiction over the person of the defendant, for the purposes of the action commenced, so as to enable the court to pronounce a judgment which shall be valid and enforceable within the territorial limits to which the court is confined. But within those limits it cannot be contended that any of these statutes is in violation of the Constitution of the United States, and no court would be justified in declaring any of them void as opposed to natural justice, or the principles of international law. Considerations of this sort belong exclusively to the legislative department, and afford no aid to the courts in opposing the ascertained will of the State. If, therefore, it is the will of the law-making power of a State that all manner of judgments shall be rendered against non-residents and absentees upon constructive service of process, such as publication, there would seem to be no power in the courts of that State to refuse obedience. These principles are fully sustained by the decision of the court of appeals in Gibbs *v.* Queen Ins. Co. (63 *N. Y.* 114). It is only when the judgment records come before foreign tribunals of a different sovereignty, and the latter are asked to enforce the judgments, that the questions

arise which were discussed and passed upon in Pennoyer *v.* Neff (95 *U. S.* [5 *Otto*] 714).

The court, therefore, could acquire jurisdiction over the person of the Baltimore & Ohio Railroad Company for the purposes of the action by any service of process authorized by the laws of the State, and the next question is whether a service of the summons and complaint upon the president of that corporation was sufficient for the purpose.

This involves a review of the legislation of the State authorizing the commencement and prosecution of actions against foreign corporations, and prescribing the mode of service of process upon them. In order not to extend the discussion to an unnecessary length, I shall not refer to actions against non-residents in general. Such review was extensively made in 1875 by FOLGER, J., delivering the opinion of the court of appeals in Gibbs *v.* Queen Ins. Co. (63 *N. Y.* 114), and the following propositions extracted from said opinion will suffice for the present occasion, viz.:

Before the Revised Statutes a foreign corporation could not be sued at law *in invitum*, in our courts (McQueen *v.* Middletown Manuf'g. Co., 16 *Johns.* 5). Upon the report of the revisers that the fair protection of our own citizens required that some provisions should be made to render such corporations amenable to our laws in our courts, certain sections were adopted. They were drawn in analogy with the provisions of the statute against absent debtors, and required that suits in the supreme court against a foreign corporation should be commenced by attachment (2 *R. S.* p. 459, §§ 15–30).

By chapter 107 of the Laws of 1849 (p. 142), it was provided that suits against any foreign corporation might be brought in the supreme court, in the superior court and court of common pleas, upon any cause of action arising in this State, by complaint and summons, with

an attachment as then provided by law ; the summons and complaint to be served as provided by sections 113 and 114 of the Code of Procedure of 1848.

But when later in the year 1849 the legislature, in enacting amendments to the Code, again took up the subject of the enforcement of rights against foreign corporations, it authorized by section 427 of chapter 438 an action against a corporation created by the law of any other country to be brought in the same courts named in chapter 107, above cited :

1. By a resident of this State, for any cause of action.

2. By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated, within this State.

This was in some respects absolutely inconsistent with chapter 107 of 1849, and so far repealed it by implication. The legislature, in authorizing an action by this section, meant the one form of action for the enforcement of private rights, which it at the same time provided for and denominated a civil action (*Code*, § 69), and inasmuch as, by section 127, that action could be commenced alone by service of a summons, and the form of that summons (§§ 128, 129) and the mode of that service, were prescribed (§§ 113, 114 of 1848), it at the same time, with the authority for bringing the action by that summons, gave, for the first time, the power to serve it on a foreign corporation, either by the delivery of a copy to a certain officer of it or by publication (§§ 134, 135 of 1849). It also, in that year, for the first time, provided for an attachment, under the Code, upon property of a foreign corporation, as a security for the satisfaction of the judgment.

The claim advanced in that case, which is also made in the case at bar, that the service of the summons must nevertheless be accompanied by the levy of

an attachment upon the property of the corporation, Judge FOLGER disposes of as follows:

"The one hundred and thirty-fourth section, as adopted in 1849, makes no limit of that kind upon the service by publication, though it was required by the corresponding section of 1848 that the absent defendant should have property in this State, or should be a resident thereof. It is not needed that stress be laid upon this difference. In 1851 sections 134 and 135 were amended, and the mode of service of summons upon a foreign corporation was brought distinctly into notice. It was declared that there might be service by delivery of a copy to any one of certain officers of it, but only when it had property in the State, or the cause of the action arose therein (§ 134); and that there might be service by publication only in one of the same cases (§ 135). These sections have since been amended, but with no narrower limitation. By putting these alternative cases, it is shown that the legislature did not mean to insist on the existence of property of the foreign corporation in this State, as always a necessary prerequisite for such a service of summons upon it, as should be the commencement of an action against it. The language of these sections is to this effect. Before you begin your action against a foreign corporation by the service of a summons upon it, by delivery of a copy or by publication, either there must be property of it in this State, or the cause of action must have arisen therein; one or the other, and either will suffice. If the legislature did not intend to make the existence of property in this State a controlling element in the right to commence an action, then it did not mean to make an attachment against property a process necessary thereto, for the plain reason that it would be futile to issue an attachment to be levied upon property when none could be found; and delusive to allow the service of summons in a case where no

property can be found in the State, if still there must be, for the effectual bringing of an action, an attachment issued and levied upon property here."

It now remains to be seen whether the Code of Civil Procedure, that went into effect since the decision of the case last referred to, has worked any change in the law as it was declared at that time.

On examination it will be found that the great feature of the prior Code, which provided for a single form of action for the enforcement of all private rights, denominated a civil action, and for the commencement thereof by the service of a summons, rendering any other conjoint process unnecessary, was carefully preserved.

It will also be found that section 427 of chapter 438 of the statute of 1849 was retained in its original language, and that section 263 of the Code of Civil Procedure, the object of which was to render the civil jurisdiction of all the superior city courts uniform, confers additional powers upon the courts named therein. That section, so far as it relates to foreign corporations, is as follows:

"§ 263. The civil jurisdiction of each of the superior city courts extends to the following actions and special proceedings, in addition to the jurisdiction, power, and authority, conferred upon it in a particular case, by special statutory provisions (subd. 7): To an action brought by a resident of that city against a foreign corporation, either, 1, to recover damages for the breach of contract, express or implied, or a sum payable by the terms of a contract, express or implied, where the contract was made, executed, or delivered within the State, or where the cause of action arose within the State; or, 2, where a warrant of attachment, granted in the action, has been actually levied, within that city, upon property of the corporation; or, 3, where the summons is served by delivery of a

copy thereof, within that city, to an officer of the corporation, as prescribed by law."

In the first two classes of cases, therefore, enumerated in subdivision 7 of section 263, it would seem that the superior city courts have power to order service of the summons by publication. But whenever the summons is served, as prescribed by law, by a delivery of a copy within the territorial jurisdiction, the jurisdiction of the courts named embraces any cause of action cognizable by the courts of the State.

The next question therefore, is, what are the requirements of the law as to personal service of the summons upon a foreign corporation?

Section 432 of the Code of Civil Procedure prescribes: Personal service of the summons, upon a defendant, being a foreign corporation, must be made by delivering a copy thereof within the State, as follows:

1. To the president, treasurer or secretary; or, if the corporation lacks either of these officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose by a writing under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied by the written consent of the person designated, and filed in the office of the Secretary of State, &c., &c., &c.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision one of this section, can be found with due diligence, AND the corporation has property within the State, OR the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State.

By this section the absolute duty of designating a person for the purpose of receiving process, as a condition upon which they may do business here, which

is specifically required of foreign fire insurance companies by other statutory provisions (*L.* 1853, p. 915, § 23; *L.* 1862, c. 367), has not been extended to foreign corporations in general. But the legislative intention in enacting it, clearly was that if a foreign corporation doing business here has not sufficient regard for its own interests to make a designation, service of process upon one of the persons enumerated in subdivisions 1 and 3, and as therein prescribed, shall in every case be sufficient. This becomes still more clear when it is considered that the section referred to is a substitute for and superseded subdivision 1 of section 134 of the prior Code, and chapter 279 of the Laws of 1855, and that the last mentioned statute provided that every foreign corporation doing business in this State should designate some person for the receipt of service of process, and that in default thereof service on any person found within this State acting as the agent of such corporation, or doing business for it, should be effectual.

Service, therefore, of the summons in this action, upon the president of the Baltimore and Ohio Railroad Company, within the limits of the city of New York, was sufficient to confer jurisdiction upon this court of the person of said corporation, for the purposes of the action. If the service which was made in fact, was regular, it having already been shown that the court also possessed jurisdiction of the subject-matter to some extent at least, the orders appealed from cannot be sustained.

It is claimed, however, that the alleged service was invalid, because access to Mr. Garrett was obtained by fraud, trick and device. This court has repeatedly held that where deceit is used for the purpose of bringing a defendant within its territorial jurisdiction, who otherwise would not be amenable thereto, the service of the summons effected by such means will be vacated

and set aside on motion (Carpenter *v.* Spooner, 2 *Sandf.* 717; Baker *v.* Wales, 3 *Jones & S.* 403).

But the rule goes no further. According to his own showing Mr. Garrett was in New York on the 26th, 27th, 28th and 29th of February, to attend a meeting of the presidents of the trunk lines and to other business there. His complaint simply is that when the parties having the papers for service first arrived, on the 28th of February, at the hotel at which he was stopping, they endeavored to gain access to him by stating that they wanted to see him on the business of the New York Elevated Railroad Company. But the fact is that they did not obtain access to him at that time, and that he was, later in the day, served in the public hall of the hotel. Moreover, the parties thus sought to be charged with improper conduct expressly denied the charge. Upon a full consideration of all the testimony read upon this point on both sides, no sufficient reason appears for setting aside the service of the summons.

The question of jurisdiction having been disposed of, it remains to be determined what should have been done below upon the hearing of the motions, and here again it is necessary to notice several technical objections before the merits are reached.

As to the injunction order, it was claimed that the alleged service of it upon Mr. Garrett was not valid, because the order purports to be a special term order, and no certified copy thereof was delivered. True, the order contained a caption which is not only usual, but necessary, in the case of a special term order. But that did not necessarily make it one. It was signed by the judge with his full name, and no direction was given to enter it, nor was it in point of fact entered. It therefore remained the judge's order.

The next claim is that if the order were to be regarded as the judge's order, it was not duly served,

because the signature of the judge was not shown as required by the Code. Section 610 requires that where the injunction order is granted by a judge, it must be served by showing the original and delivering a copy thereof. The service was made by one Henry C. Freeman, who is thirty-three years of age, and perfectly familiar with serving process. He testifies positively that when he gave the envelope which contained the papers into the hands of Mr. Garrett, he informed him that the contents consisted of the summons and complaint and injunction in a suit against the Baltimore and Ohio Railroad Company; that Mr. Garrett took the papers; that then he (Freeman) opened the original injunction order, showed Garrett the judge's signature at the foot thereof, and said to him: "This is the signature of Chief Justice CURTIS to the original injunction order, of which you have a copy inside;" that Garrett took the papers out of the envelope, looked at them, and went with them in his hand through the hall towards his room. In this statement Freeman stands fully corroborated by Mr. Vose, a student-at-law in the office of plaintiff's attorneys, and as Mr. Garrett admits that a paper, partly written and partly printed, was shown to him, and that reference was made to Judge CURTIS, and that thereupon he went directly to his room, and then took the papers from the envelope and read them, the clear weight of evidence, supported by the probabilities, is that the judge's signature to the original order was shown.

It is also insisted that the injunction order itself is defective and void, because it does not recite the grounds of the injunction. True, section 610 of the Code of Civil Procedure prescribes that the injunction order should briefly state the grounds for the injunction. But a failure to comply with this requirement is not a jurisdictional defect. It constitutes only an irregularity for which the injunction order may be set

aside, and if no substantial right of the defendant has been violated, the defect may be disregarded or supplied under section 723. No prejudice is shown to have accrued in this case, nor is the order, as drawn, wholly defective in the particular referred to. It states that it was made on the verified complaint and affidavit of A. B. Chandler, copies of which were served with it. These contain the grounds on which the judge acted, and the order refers the defendants to them as therein stated. In some cases,—as, for instance, where the complaint is not served with the order, or where the grounds of the injunction are matters extrinsic to the cause of the action set forth in the complaint,—the requirement of the Code may be of value. But in the case at bar, where the grounds of injunction are fully contained in the complaint and affidavit accompanying it, and the order in terms refers to such papers, and where copies of such papers were served with a copy of the order, and no prejudice whatever is shown to have accrued from the plaintiff's omission to comply literally with the requirement of section 610, the right and justice of the case require that the objection founded upon this defect, if it be one, should not be entertained on appeal in the first instance. The same considerations would dispose of the remaining objection that the preliminary injunction, as granted, does not strictly follow the prayer for an injunction contained in the complaint, even if there were a requirement that this should be so, which is not the case.

As to the merits of the controversy.

As already stated there was, on the hearing below, quite a dispute as to the nature and terms of the agreement upon which the plaintiff relies. Upon the whole case I have not been able to satisfy myself that such a contract existed between the parties as is alleged in the complaint. The plaintiff failed to prove an acceptance of the formal written contract relating to the line

from Washington, Pa., to Columbus, Ohio, which was made and executed by it, and sent to the Baltimore and Ohio Railroad Company for execution, while the latter showed expressly its refusal of it. Consequently, whatever arrangement may have existed in respect to that line must be deemed to have been substantially the same as it existed between the parties as to the other lines. The plaintiff also failed to show, by a preponderance of proof, that, as to all other lines, it was entitled to one year's notice of the intention of the Baltimore and Ohio Railroad Company to acquire the absolute ownership and control of them, to the exclusion of the plaintiff from their use. But the clear weight of the evidence is that the railroad could only acquire such absolute ownership and exclusive control upon payment to the plaintiff of the cost of the lines. In this respect the claim of the plaintiff stands corroborated by the affidavits of Eckert and Tinker, read on behalf of the defendants, while Mr. Garrett is the only one who testifies to the contrary. This state of the proof, even when considered wholly apart from the improbability and unreasonableness of the claim made, that the railroad company had the right to acquire the absolute ownership and exclusive control, if it saw fit, of the lines, the day after they were built, and the amount of compensation was to be left an open question, becomes still more important when it is borne in mind that it is agreed, on all sides, that the arrangement between the two companies, whatever it was, was made between General Eckert, who was formerly president of the plaintiff's corporation, and now is the president of the American Union Telegraph Company, as the representative of the plaintiff, on the one hand, and Mr. Garrett, as the representative of the Baltimore and Ohio Railroad Company, on the other hand.

The same questions seem to have been litigated by the parties to this action on a motion made by the

plaintiff before Judge TULEY of the circuit court of Cook county, in the State of Illinois, for an injunction similar to the one prayed for here, upon proof corresponding very much to the proof here.

Judge TULEY held: That the arrangement between the plaintiff and the railroad company was in the nature of a partnership or joint adventure. The property of each was used to make money for both, and was used as joint property, for the common benefit. By the joint arrangement the property of the parties became to some extent so intermingled that it was necessary on its termination that the railroad company should own all the property, and for the railroad company's own security it was necessary that this power to terminate the joint arrangement and take possession should exist. But a court of equity will scan, as with an eagle's eye, the circumstances attending the exercise of that legal right, to discover, if possible, whether the right has been exercised in good faith, or whether the virus of *mala fides* has destroyed the vitality of the act. In the course of his examination into such attending circumstances which he then made, Judge TULEY says: "In the first place, the primary object of this power being reserved to the railroad company, was for its own protection. It was not to enable the railroad company to obtain any unfair advantage over the telegraph company, and obtain its property at an under value, or to enable it to wantonly or oppressively injure or destroy the telegraph company; nor to enable the railroad company to speculate upon the property it might acquire by terminating the agreement, but it was solely to be used for its, the railroad company's, own protection and benefit. No cause of complaint appears to exist against the telegraph company; it does not appear that it has not carried out its contract in good faith, nor does it appear that it was necessary for the protection of the railroad company that the

agreement should be terminated. The same day it was terminated, an arrangement was made by the Baltimore and Ohio Railroad Company with a rival telegraph company. Was it good faith to terminate the agreement to benefit a rival in business of the telegraph company? Was it a *bona fide* exercise of this power to terminate this agreement for the joint benefit of the railroad company and the American Union Telegraph Company? Tried by the standard of morality that pervails in this court, both these questions must be answered in the negative. Would the exercise of this right, in order that the railroad company might have an advantage in the settlement of accounts, be an exercise of the power in good faith? Most clearly not. The defendant railroad does not by its answer state that it offered to pay for the property, or that it is now willing to pay for the same. The only offer it made on taking possession, or now makes, is to adjust accounts. Does good faith resort to deceit and fraud to enable it to exercise a clear, legal right, as by giving notice, on February 28, that possession would be taken March 1, and then taking possession clandestinely within five hours after the notice is given? This may be justifiable by a standard of good faith that exists elsewhere, but cannot be justified by the standard that exists in a court of conscience."

Having reached this conclusion, and having previously found, that, as a matter of fact, payment was to be made upon taking possession, and that it was to be a payment of the original cost, and not a balancing or settlement of accounts, the learned judge granted the motion for an injunction.

In the case at bar I can reach no different result. Independent of the question whether the plaintiff under all the circumstances is, or is not, entitled to at least a reasonable notice, and assuming that all the lines in controversy were erected by the plaintiff upon, and

affixed to, real estate belonging to the railroad company, under a mere license, revocable at the pleasure of the railroad company, which is the aspect most favorable to the latter, though not strictly true in fact, such license was given pursuant to an agreement that its revocation should be accompanied by payment, and that in the meantime the plaintiff should have the full, free and uninterrupted use of the lines. The giving of the license constituted only part of the agreement. The lines were erected on the faith of the whole of it, and are protected by it. The right of the railroad company to acquire the absolute ownership and exclusive control depends not merely upon a revocation of the license, but on the performance of a condition which, by the terms of the agreement, is to be performed on its part in connection with, and at the time of the revocation. That condition is payment, or tender of payment at least, and it is a condition precedent.

The agreement clearly had, as was truly said by the learned counsel for the plaintiff, two parts, that were reciprocal and dependent the one on the other. So that if there was agreement enough to support the claim of the defendants, that by means of it they are entitled to become owners of the plaintiff's property, it is sufficient also to entitle the plaintiff to protection against the consummation of an illegal scheme to obtain possession without making compensation. The issues upon which the railroad company's claim of title must turn depend upon the details of the arrangement, which can only be derived from the examination and cross-examination of all parties personally concerned in the business. Upon their present affidavits the strong preponderance of proof is that the joint arrangement was only to be terminated on making compensation. This, in connection with the other proof in the case, showing the importance to the plaintiff of the lines in controversy, as connecting links in its entire system of

telegraphic communication over the whole country, and the irreparable injury the plaintiff would sustain, if the company were permitted to take possession and exclusive control without making compensation at the same time, is amply sufficient to warrant a court of equity to restrain by injunction a threatened violent usurpation of its decision.

Upon this point Judge MCCRARY of the United States circuit court for the district of Nebraska, in the case of Atlantic & Pacific Telegraph Co. *v.* Union Pacific Railway Co. and the American Union Telegraph Co., heard at St. Louis, Mo., April, 1880, makes the following pertinent remarks:

"The right of rescission does not justify the railroad company in taking possession, except by lawful means. The plaintiff has a right to be heard upon issue in a proper proceeding before being ejected. The present question is not, whether the contracts should, in such a proceeding, be rescinded and the property restored to the railroad company, but whether this should be done by the railroad company upon its own motion, and in a way deprive the plaintiff, not only of a hearing in a regular course in this court, but also deprive it of the right to appeal. It is one thing for me to hold that the contracts are, in my judgment, *ultra vires*, and quite another to say to the railroad company: 'You may turn the plaintiff out and take possession without giving it a day in court.' An injunction will often be granted to restrain a party deciding for himself a question involving controverted rights, and to compel him to resort to the courts, and this without regard to the absolute merits of the controversy; it is enough that there is a controversy to justify a court of equity in directing that it be settled by legal proceedings (Eckelkamp *v.* Schroeder, 45 *Mo.* 505; Varick *v.* New York, 4 *Johns. Ch.* 53; Dudley *v.* Trustees, 12 B. Monroe, 610; Farmers *v.* Reno, 53 *Pa.*

St. 224; Lansing *v.* Steamboat Co., 7 *Johns. Ch.* 162). The principle settled by these and many other cases is, that a party who is in actual possession of property, claiming under color of title, is not to be ousted, except by the means provided by law, and such a possession a court will protect by injunction from disturbance by any other means. For this reason, therefore, as well as upon the grounds above stated, I am clearly of the opinion that the railway company cannot be permitted to oust the plaintiff from possession without process."

But though the plaintiff thus presents large equities calling for protection, this court, owing to the local character of part of the cause of action, as already stated when the point as to the jurisdiction was considered, can interpose only to a limited extent. It cannot act directly upon the actual possession of the property in dispute which is not within this State. The most it can do, is to protect the plaintiff against unlawful interference set or to be set on foot within this State, and to the extent as the proofs disclosed any such interference, actual or threatened, the preliminary injunction might have been retained, if the plaintiff had asked for it.

For the foregoing reasons the motion of the railroad company to set aside the summons, complaint, and injunction, and the service thereof, and the motion of the American Union Telegraph Company to set aside the supplemental summons, complaint and injunction, and the service thereof, and also the order bringing in said company as a party defendant, should, each of them, have been denied.

On the motion of the plaintiff for the continuance of the injunction, an order might properly have been granted, in effect enjoining and restraining the defendants, and each of them, their officers, attorneys, agents and servants, during the pendency of the action, from taking any steps within the State of New York towards

completing or consummating the contract alleged to have been entered into between the defendants, with a view to deprive the plaintiff of the use or control of the wires, poles and property described in the complaint, or from giving or transmitting within or from the State of New York any orders in respect thereto, or from in any other way interfering, or continuing to interfere, within the State of New York, with the plaintiff's rights in said wires, poles and property.

But as the plaintiff made no request for an injunction in such modified form, and as the injunction, as originally granted, was, for the reasons hereinbefore stated, too broad to be continued, the motion for its continuance, instead of being dismissed, might well have been denied, without prejudice to an application for such injunctive relief as the court had power to grant in the premises. And this is as far as it is expedient to go on the present appeal.

An inquiry should also have been instituted as to the contempt alleged to have been committed by the railroad company and J. W. Garrett. The preliminary injunction having been made with jurisdiction, the defendants were bound to respect it, whether there was an irregularity about it or not, or whether it was too broad or not. As was said in People *v.* Compton (1 *Duer*, 512), he who resists the order or process of a court of justice, trusting to his own belief of its want of jurisdiction, acts, in all cases, at his own peril, and, when he is proved to be mistaken, is, in all cases, justly punished. It is upon this principle alone that the supremacy of the law, and the just authority of courts of justice, can be maintained.

So it has been expressly decided by the court of appeals in the recent case of Mayor, &c. *v.* New York and Staten Island Ferry Company, that a corporation can be restrained by injunction; that it can be fined and its property sequestrated for a violation thereof;

that an injunction must not be defeated by subterfuges and tricks, and that all persons bound to obey it may be guilty of a violation as well by aiding, abetting or countenancing others in violating it, as by doing it directly.

In the case at bar the plaintiff claimed that after the issuing of the preliminary injunction, and before its actual service, but with knowledge of its existence and the intent to defeat it, John W. Garrett, as president of the railroad company, and others, acting under orders from him, committed certain acts in the city of New York, and that during the same interval, and also during the period intervening between the service of the injunction and the hearing of the motions, certain occurrences took place elsewhere, in pursuance of orders sent from New York, in consequence of which the plaintiff was deprived of the use of certain lines of telegraph, which the injunction was designed to protect. Without going into details I will simply state that enough was shown to make it the duty of the court to take cognizance of the charge and to make inquiry. If for that purpose it was necessary, in order to acquire jurisdiction over the person of John W. Garrett, to bring him in on an attachment against his person, as was claimed by the plaintiff, such attachment should have been granted. So, if the proof adduced in support of the charges made was not sufficiently explicit, the motion to punish might have been allowed to stand over for further and more detailed proof, or a reference might have been ordered to take proof, and ascertain the precise facts. As this branch of the case received no consideration below, owing to the grounds upon which all the motions were disposed of, and should not be determined until the court is in possession of all the facts that bear upon it, and especially as the proof at present before the court is not so full and explicit as it evidently can be made, it seems

to me that the general term should not proceed to finally adjudicate upon it. I am of the opinion that the best disposition to be made of it upon the present appeals, is to order that an attachment issue against John W. Garrett, bailable in a sum sufficient to secure his attendance hereafter; that interrogatories be filed and served touching the alleged contempts; that the railroad company and John W. Garrett be required to make written answers thereto, and that it be referred to a referee to examine the said John W. Garrett on oath, upon the said interrogatories, to take such further proofs as either party may produce before him touching the alleged contempts, and to ascertain what injury, if any, the plaintiff sustained in consequence thereof, and the extent thereof, and that he report such answers and proofs to this court, with his opinion thereon, and that upon the coming of in of said report either party may, on eight days' notice, move at special term for the proper order and adjudication thereon, and that for these purposes the case be remitted to the special term.

The orders appealed from should be reversed, with costs, and orders entered determining the several motions in conformity with the views above expressed. The orders so to be entered should be settled on notice, and on such settlement further suggestions of counsel as to details will receive due attention.

SEDGWICK, Ch. J.—I am of opinion that under section 432, Code of Civil Procedure, personal service was made upon the Baltimore and Ohio Railroad Company, defendant, by the delivery of the copy of the summons to the president of the company. The only doubt on the subject is raised by the suggestion, that the gentleman to whom the copy was delivered was not within this State as president, or then acting as such for the company. His own affidavit, however, shows, that besides his being in this State on

February 28, when service was made, and on the 27th and 26th, "to attend a meeting of the presidents of the trunk lines, and to other business there," he was on the 28th representing the company and acting for it, in the specific matter involved in this action. In his affidavit, he says that on that day, he, on behalf of his company, signed a notice to plaintiff, that named a time for terminating the arrangement between us and taking possession of the lines, and instructed Mr. Tinker to deliver the same to the president of the plaintiff; and on the same day, after the service, he saw Mr. Tinker and asked him what he had done in the matter of the Atlantic and Pacific Telegraph Company's lines, and received particular information. The control of the matter had been given to him by his company. His affidavit identifies him with the company. It contains averments of this kind: I could not tell at what time changed relations, &c., might require "me to have full and prompt possession of all the lines on the Baltimore and Ohio Railroad Company and its connections; it was distinctly agreed that "I was to be at liberty any time I pleased to revoke the license I was giving," and "at the same time to take possession, if I so pleased, of all wires and poles; for some time previous to February 28 I had contemplated and determined to terminate, absolutely, all relations with the telegraph company, and to exercise my right to take possession of such wires and poles as it had erected; I instructed my superintendent of telegraph, (Mr. Charles A. Tinker) about the 12th of February last, to go to New York and personally to notify the president of the telegraph company of my intention." The proof, therefore, was, that he was within this State, acting as president, at the time the service was made. Under this view the service being good, if nothing else called for an examination of the nature and validity of the claim stated in the complaint, any

objection to the jurisdiction of the court, must be made in the regular way, by pleading.

The motion to continue the injunctions was met by an objection which involves an examination, to a certain extent, of the claim made by the complaint. The injunction orders did not require a broader examination than was necessary to determine whether the complaint stated any cause of action, which supported the injunctions.

The first injunction order was made upon an original complaint against the Baltimore and Ohio Railroad Company only. The injunction was "from directly or indirectly interfering with or taking possession of any lines of telegraph or telegraphic wires now belonging to or operated by the plaintiff, or from interfering with or preventing the workmen of the plaintiff from repairing or maintaining the same, or any of them, or from cutting or disturbing any of the said wires, whether on the lines of railway belonging to the defendant or operated or managed by it, or in connection with its own lines."

A temporary injunction may be granted where it appears from the complaint that the plaintiff demands and is entitled to judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff (*Code Civ. Pro.* § 603). Under this section the question was, did the complaint show that the plaintiff was entitled to judgment, that defendant be enjoined from interfering with or taking possession of the specified wires, or from cutting or disturbing them, or from preventing the workmen of plaintiff from repairing or maintaining them. Under section 604, a temporary injunction may be granted where it appears by affidavit that the defendant, during the pendency of the action, threatens or is about to do, &c., an act

in violation of plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual.

After the injunction order referred to was obtained, the American Union Telegraph Company was by leave of court made defendant, and a supplemental complaint was served, and a second injunction order was obtained. There seems to have been no attention given below, as to what was the status of the first injunction order after the second was obtained, nor was there on this appeal.

The argument of the motion as to both orders was brought on on the same day, and was made after the service of supplemental complaint, at least upon the defendant, the American Union Telegraph Company. For the purpose of giving my opinion, it is not necessary to say more than that as the supplemental complaint superseded the original complaint, the validity of the injunction orders must be examined in view of the supplemental complaint. This supplemental complaint contained reference to the allegations of the original complaint, and these may for this purpose be considered as incorporated in the supplemental complaint. The first or original complaint was framed when the plaintiffs were in possession of the wires and poles, and the relief it asked was, that the defendant, the Baltimore and Ohio R. R. Co. be enjoined from interfering with that possession, and also that there be an accounting. The supplemental complaint was framed after the Baltimore and Ohio Railroad Company had taken possession of the wires and poles, in violation of first injunction order, as the supplemental complaint the alleged. It proceeded to charge that this was done in pursuance of a combination between the two defendants. It alleged that, in pursuance of the combination, the defendants did, "in violation of the injunction order aforesaid, which was well known at that time to both

of said defendants, take possession of the lines of the plaintiff, which are more particularly described in the complaint herein, upon and along the railways belonging to and operated by the defendant, &c., and cut the said wires of this plaintiff, or which were operated by it, and connected them with the wires of the defendant, the American Union Telegraph Company, and did break up and interfere with and disturb the connections heretofore existing, &c., to the great damage of this plaintiff to the amount already of at least twenty-five thousand dollars," also, "the defendants will, unless restrained by the injunction order of this court, continue their unlawful interference with the peaceable possession and operation by the plaintiff of its telegraph lines and wires aforesaid, and will continue to interfere with and disturb and prevent its telegraphic connections aforesaid." "Wherefore, this plaintiff prays that it may be adjudged, that the defendants, &c., be perpetually enjoined from indirectly or directly interfering with or taking possession of the said several lines of telegraph, &c., that a preliminary injunction be granted, &c., to the same effect as hereinbefore prayed for in regard to such perpetual injunction," and "that they may be required and directed to deliver up possession of said lines of telegraph to this plaintiff, and to pay to this plaintiff such damages as it may heretofore have sustained, or may hereafter sustain, by reason of the unlawful acts in this supplemental complaint averred."

The second injunction order, obtained upon this supplemental complaint, was, that both defendants be enjoined "from directly or indirectly interfering with, or taking possession of any lines of telegraph or telegraphic wires heretofore operated by the plaintiff, along or upon any of the lines of railway belonging to the Baltimore and Ohio Railroad Company, or in connection with its own railway, or from preventing

the plaintiff from operating the same in connection with its other lines."

We can see clearly, from this particular statement, that under sections 603 and 604, the only act, which, if done during the pendency of the action, would produce injury to the plaintiff or tend to render the judgment ineffectual, is the defendants taking or keeping possession of the telegraphic wires and poles. The acts enjoined, if done, would not affect the accounting or the judgment for damages. The first question, then, is, is the plaintiff entitled to a judgment, that the defendants be perpetually enjoined from taking possession of wires and poles, that, if not real estate, are fixtures for the purposes of this litigation, and are not within the territorial jurisdiction of this State?

I am constrained to believe that this court has no direct jurisdiction over the possession of property situated elsewhere. Wherever courts of equity have taken jurisdiction of actions that concerned real estate in another territory, they have almost uniformly disclaimed the right to make a decree that directly and proximately affected the title or the actual possession. In actions for specific performance, the courts in equity compelled the party to perform his contract, *e. g.*, by giving a deed, which might be competently given anywhere, and avowed that its jurisdiction stopped there, and that it did not pretend to pass upon the fact of title or possession. There never was a case where the court, in addition to decreeing the deed, decided or decreed what should be done under the deed, outside of its territorial jurisdiction.

I think there would be no doubt of this if attention were confined, as it should in strictness be, to the supplemental complaint. The first relief demanded, that the defendants should be enjoined from taking possession of the wires, was inappropriate, in view of the allegation that the defendants had already taken

possession of the wires, except as viewed in connection with the further relief asked, that the defendants be required and directed to deliver up possession of said lines of telegraph to this plaintiff. I do not think it would be argued that the court had power to make such a judgment.

It may be supposed, however, that the court might refuse to make any decree as to the possession, but would bind the parties by making it their obligation to obey an injunction order or judgment. If this could be done, the scruples of courts of equity, against acting on title and possession, would have been ineffectual to restrain them, for they could have decreed injunctions as to the title or the possession, wherever the defendants had been served with subpœna.

There is an authority which would prevent the court making this judgment of perpetual injunction. According to People *v.* Central R. R. Co. of N. J., the courts of this State have no power to enforce it against the principal defendant, the Baltimore and Ohio Railroad Co. In that case, Judge SMITH said, delivering the opinion of the court (42 *N. Y.* p. 306): "The defendants are a corporation organized under the laws of New Jersey, and must be deemed non-residents of this State. This judgment, therefore, cannot be enforced by process of attachment and proceedings as for a contempt, as against citizens of this State. Such an attempt and proceeding would obviously prove utterly abortive."

The very highest authority has made the distinction adverted to, viz.: that the court will not act immediately upon title or possession. Penn *v.* Baltimore (1 *Ves.* 444, A. D. 1780) is the foundation case of the law, as to the power of courts in equity, in regard to land out of their jurisdiction. It is unnecessary to state the facts of this familiar case. It is enough to remember that Lord HARDWICKE had decreed that the

parties should specifically perform the articles concerning the boundaries, and that releases should be given. Then, "His lordship having directed that the plaintiffs and defendants should quietly hold according to the articles, altered that, for it would be improper to have a decree in this court for quiet enjoyment of lands in America, which would occasion continual application to this court for contempt, &c., that it ought to be the proper jurisdiction." Muller *v.* Dowes (94 *U. S.* 444), points out the limitation of jurisdiction. The court below had decreed a foreclosure of a mortgage upon real estate which was, in fact, out of the territorial jurisdiction of the court. The supreme court, Mr. Justice STRONG giving the opinion, affirmed the jurisdiction of the court below, but evidently not on the ground that the court had jurisdiction directly over the real estate, or the title or the possession of it. Such a proposition had never been made. If there was jurisdiction it would have been enough for the court to decree a sale, and that its master should enforce the decree by executing a deed. But, as the master was only an officer or agent of the court, such a proceeding would be an immediate and direct exercise of power by the court over the real estate; and, therefore, the decree was supported by the provisions in it, that the parties in interest who had the title, should transfer it by proper conveyances to the persons buying at the sale, to whom the master should make the deed. Mr. Justice STRONG said, "It is here undoubtedly a recognized doctrine, that a court of equity sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True, it cannot send its process into that other State, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title." I have no

doubt that the learned judge meant that the court could command the parties to do that within its jurisdiction, which, according to the agreement of the parties, or the circumstances which made the equitable cause of action before the court, it was the intent of the parties should be done to transfer the title, or which it was their equitable obligation to do towards that end. Mr. Justice STRONG then says: "And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees, where they are complainants." "The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in further assurance." The limitation of the powers of the court in the respect which we have in view, is clearly recognized. The cited case, it must be said, is applicable only to its particular circumstance. If there were, in fact, parties entitled to redeem by virtue of liens upon land out of the jurisdiction of the court, it would be difficult to say, under the law of New York, that they would be foreclosed by a proceeding like that in Muller *v.* Dows.

What has been said convinces me that the complaint did not show that the plaintiff was entitled to a judgment, restraining the defendant from the things specifically enjoined by the temporary injunctions, and that the temporary injunction did not enjoin the doing of things which would render ineffectual the judgment the plaintiff was entitled *prima facie* to obtain.

In the other matters which have been passed upon by Judge FREEDMAN, I also agree with him, and concur in his disposition of the appeal.

Appellants' Points.

JOHN P. BRANCH, ET AL., APPELLANTS, *v.* LAZARUS LEVY, ET AL., RESPONDENTS.

Witness—when credibility of, must be assumed.

Where the plaintiff voluntarily calls the defendant as a witness, as to matters not merely formal,—upon a motion for a dismissal of the complaint, the judge is bound to consider him a credible witness as to the facts testified to by him, whether upon the direct or upon the cross-examination.*

It seems, that in such case defendant must be held credible as against the plaintiff, even as to matters testified to by him when subsequently called by the defense.

In this case, the court held that the complaint was properly dismissed.

Before SEDGWICK, Ch. J., and FREEDMAN, J.

Decided December 6, 1880.

Appeal from judgment.

The facts are stated in the opinion.

Grimball & Tunstall, attorneys, and *R. B. Tunstall*, of counsel, among other things, urged:—I. It cannot be claimed that because the defendant Borg was not directly contradicted, the complaint must have been dismissed on his part. A court cannot dismiss a complaint on the testimony of the witness, even though it be not directly contradicted, if the story of the witness is improbable, or if the witness be an interested party (Elwood *v.* Western Union Tel. Co., 45 *N. Y.* 553; Kavanagh *v.* Wilson, 70 *N. Y.* 177; Gildersleeve *v.* Landon, 73 *Id.* 609; Brooklyn Crosstown R. R. Co. *v.* Strong, 75 *Id.* 591). Borg was a defendant, and his story was improbable. Again, "A party is

* See Hodge *v.* City of Buffalo (1 *Abb. New Cas.* 356), and note on weight of testimony of parties.

not bound by the admission of his adversary, of which he gives evidence, but is at liberty to use it so far as it makes in his favor, and to disprove the residue —that is, he is not estopped by it" (Mott *v.* Consumers' Ice Co., 73 *N. Y.* 550). Nor are the plaintiffs bound by the testimony of the defendant Borg, because they called him. He was called merely on a technical point—to prove the writing of a letter—and was not examined by the plaintiffs further. And moreover, the Code expressly declares—"The testimony of a party, taken at the instance of the adverse party, orally or by deposition, may be rebutted by other evidence" (*Code Civ. Pro.* § 838).

II. It was error to allow the defendants' counsel to bring out his defense on the cross-examination of the witness, Borg. The plaintiffs had called the defendant as a witness, merely to prove the writing of a letter. They were compelled to do this by the court. They examined the witness on no other subject—hence the defendants were limited in their cross-examination to this one point, and in allowing the defendants to bring out their whole defense was error (1 *Greenl. Ev.* § 445).

Burton N. Harrison, for respondent, among other things, urged:—I. By introducing the defendant Borg, and swearing him as their own witness, as they did, plaintiffs are estopped from denying his credibility. That witness testified, unequivocally, to facts which destroy the whole theory of plaintiffs' case. There is no pretense that, in doing so, the witness took plaintiffs by surprise, or practiced any deceit upon them. There was no necessity for the introduction of this witness by plaintiffs. They could have called the person who wrote the letter they desired to prove to have been written by authority of defendants; or, if not, and if they found themselves entangled in an unex-

pected difficulty on the trial, and if they were unwilling to vouch for the credibility of Borg by swearing him as their own witness, and if they were unwilling to rest their case without proof of the letter in question, they could have withdrawn a juror or submitted to a non-suit. Even if there was any other testimony, or any evidence of any kind, in the case, which contradicted the witness, Borg, the plaintiffs could not, under the circumstances, have availed themselves of it; there can be no contention that Borg was innocently mistaken as to the very fact at issue. For the purposes of this case, it must be held that, either the essential, absolute facts are exactly as Borg swore they are, or that Borg is entirely incredible as a witness. If the facts are as he swore, the judgment must be affirmed; and the plaintiffs cannot here open their mouths to say that their own witness is utterly incredible; certainly they cannot do so when the witness is not contradicted by anything in the case, but swears to facts which harmonize and are consistent with all the facts in evidence (5 *Den.* 112; 56 *N. Y.* 590; 4 *Id.* 303, 311). The rule is rigid that: "Where unimpeached witnesses testify distinctly and positively to a fact, and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption" (45 *N. Y.* 553). The exceptions to, first, the strict cross-examination of plaintiffs' own witness in reference to the circumstances under which the letter, as to which they had examined him, was written; and, next, an examination (which was, indeed, a fair and proper extension of the same cross-examination) into the full particulars of the transaction, are not good. As was said by SEDGWICK, J., delivering an opinion of the general term of this court: "The rule in this State (1 *Greenl. Ev.* § 445; Jackson *v.* Varick, 7 *Cow.* 242; Varick *v.* Jackson, 2 *Wend.* 251; Fulton Bank *v.* Stafford, 2 *Id.* 483; Bogert *v.* Bogert, 2 *Edw. Ch.* 403) is, that when a witness is

placed upon the stand and examined, even as to formal matters, he is thereby made a witness for all purposes, and may be cross-examined in the whole case" (34 *Super. Ct.* 549). "When a witness has been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but he may examine him as to any matter embraced in the issue. He may establish his defense by him without calling any other witnesses" (2 *Wend.* 483).

BY THE COURT.—SEDGWICK, Ch. J.—On the trial, it appeared that if one Harrison acted as broker for the defendants, in selling certain coupons to the plaintiffs, the defendants were liable to plaintiffs for not delivering them, but if Harrison had bought the coupons from the defendants and then sold them to plaintiffs, the defendants were not liable.

The plaintiffs sustained their position that Harrison was an agent, by certain letters and circumstances, which, in the absence of explanation by defendants, made a question for the jury. But there was no admission by any letter of defendant that there was such agency, nor was there any direct proof on that subject, excepting such as was given by one of the defendants. When on the stand, he swore that Harrison was a buyer of the coupons from the defendants, and not their agent. This testimony, if true, was not inconsistent with any other testimony, but furnished the explanation that the documents and circumstances called for. In order to justify the court in dismissing the complaint, it was only necessary to determine that the defendant was a credible witness. I am of opinion that the judge was bound to hold the witness credible, from the fact that the plaintiffs had called the defendant as their own witness, and thereby presented him as credible. It is suggested that these facts came

out on cross-examination. It would make no difference at what time they were called out, even if on direct examination as a witness for the defense, provided the plaintiffs had previously called him and presented him to a jury as credible. They could not thereafter gainsay that. The purpose for which the plaintiffs called the defendant as a witness was not formal, nor were they obliged by law to call him. Their action was voluntary, and when they called him to the book to be sworn, they admitted and asserted that he would be bound by the obligations of an oath. The circumstances did not allow a supposition that he might be mistaken, and that his testimony, therefore, might be corrected by the other testimony.

I think that the rule on this subject applies to a party called as a witness by the opposite party. There would be the same inconsistency, in case of a party, in asserting that he was not a credible witness as to some things, while he was as to others. Credibility cannot be divided. It is attached to the moral character. I therefore think that the court was correct in holding that, as against the plaintiff, who called the defendant, the testimony of the latter should be believed, and the complaint dismissed.

This view of the legal force of the defendant's testimony renders unnecessary an examination of the exception to the admission of certain letters of the defendants.

The judgment should be affirmed, with costs.

FREEDMAN, J., concurred.

Statement of the Case.

ROBERT B. BORLAND, RESPONDENT, *v.* THE MERCANTILE MUTUAL INSURANCE COMPANY, APPELLANT.

Marine insurance—seaworthiness, when and how must be shown—barratry —construction of policy.—Agreement of counsel on trial.

In an action upon a marine policy, insuring the cargo of a vessel, the insured, in the first instance, need only give general testimony as to the seaworthiness of the vessel, but at the close of the case, the fact of seaworthiness must affirmatively appear in those particulars as to which an attack has been made.

Where it appears that cargo was so laden upon the deck, as to be likely to interfere with the movements of the crew in navigating the vessel, there is a presumption of unseaworthiness, which, if not overcome (by showing affirmatively that the deck cargo was not likely to interfere with the due management of the vessel), will prevent the insured from recovering, though such lading be an act of barratry by the master, and the policy contain a clause insuring against the master's barratry; seaworthiness must exist as a condition precedent to the policy attaching.

Under chapter 242 of the Laws 1857, a foreign vessel which leaves the port of New York without a licensed pilot, is presumed to be unseaworthy, and this presumption is not answered by proof that she was safely navigated out of the port.

It seems, that to constitute barratry of the master, it is enough that the barratrous act was done willfully, and with a knowledge that it was wrong, irrespective of any fraudulent intent on his part.

A clause in a marine policy, providing that the insurer is "not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel," comprises leakage from sea perils insured against, as well as ordinary leakage, from whatever receptable it may occur. Such a clause is not to be deemed an exception from general liability, and where part of the loss was from leakage, the insured must prove the amount and cause thereof, to enable him to recover.

Agreement of counsel on the trial as to amount of cargo jettisoned, is binding on the parties.

Before SEDGWICK, Ch. J., and SPEIR, J.

Decided December 6, 1880.

Appellant's Points.

Appeal by defendant from judgment, and from order denying a motion for a new trial.

The action was on a policy of marine insurance, containing, among other clauses, the following:

"Touching the adventures and perils which the said Mercantile Mutual Insurance Company is contented to bear, and takes upon itself in this voyage (unless specially excepted on the margin of this policy), they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof."

The facts and the exceptions taken appear in the opinion of the court.

Scudder & Carter, attorneys, and *George A. Black*, of counsel, for appellant, urged:—I. The shipper of cargo impliedly warrants the seaworthiness of the vessel to his insurer (Silva *v.* Low, 1 *Johns. Cas.* 198; Howard *v.* Orient Mut. Ins. Co., 2 *Robt.* 539; Warren *v.* United Ins. Co., 2 *Johns. Cas.* 231; 2 *Arnould Mar. Ins.* 591; citing Oliver *v.* Cowles, 1 *Park Ins.* 470; Daniel *v.* Harris, *L. R.*, 10 *Com. Pleas*, 1; Kopitoff *v.* Wilson, *L. R.*, 1 *Q. B.* 381). (1) The warranty is a condition precedent to the policy attaching (2 *Arnould Ins.* 590). This policy was a voyage policy on these goods at and from New York to Pernambuco; and the seaworthiness of the vessel was warranted from the commencement of the voyage. (2) To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, staunch and strong as to be

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competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo under deck (Dupont *v.* The Elizabeth, 19 *How. U. S.* 162). If the ship is so heavily or so improperly loaded when she sails on the voyage insured as to be incapable of continuing the voyage, that is unseaworthiness (*Arnould Mar. Ins.* 612; Biccard *v.* Shepherd, 14 *Moore P. C.* 497; Foley *v.* Tabor, 2 *Foster & F.* 663). A ship is unseaworthy if the risk is materially increased by reason of the difficulty in navigating the ship, caused either by overloading or bad storage of the cargo, and it is not necessary for the insurer to make out that the loss was caused by the unseaworthiness relied upon. The question depends on the state of the ship when she sailed on her voyage (Wedderburn *v.* Bell, 1 *Campb.* 1; Quebec Marine Ins. Co. *v.* Com. Bk. of Canada, *L. R.*, 3 *P. C. Ap. Cas.* 240; Weston *v.* Minot, 3 *Woodb. & M.* 436; Leitch *v.* At. Un. Ins. Co., 66 *N. Y.* 108). (*a*) The theory was advanced that the act of the master, in carrying cargo on deck, was barratrous, and protection is sought for the plaintiff in that view. The implied warranty of seaworthiness is a condition precedent to the policy attaching, and if it did not attach by reason of the overloading, the insurance against barratry did not exist. The case of Atkinson *v.* Great W. Ins. Co. (65 *N. Y.* 531), shows that the act of the master must be not only willful, but fraudulent, and that the charge was deficient in the definition given of what would constitute barratry. (3) A ship is unseaworthy if she is without a pilot, where usage or the reason of the case required that she have one (*Abbott Ship.* 344; *Dixon Ship.* 100, 232 [3 ed.]; Stanwood *v.* Rich, Mass. Sup. Ct., Suffolk Co., Nov. 1817; 2 *Key's Law Shipmaster, &c.*, 756; Dixon *v.* Sadler, 5 *Mees. & W.* 414). This, whether the loss can be traced to such breach of warranty in not providing a pilot, or not (Phillips *v.*

Hadlam, 2 *B. & A.* 380; Quebec M. Ins. Co. *v.* Comm. Bk., *L. R.*, 3 *P. C.* 234; Law *v.* Hollingsworth, 7 *T. R.* 160; Whitney *v.* Ocean Ins. Co., 14 *La. O. S.* 485; McDowell *v.* Gen. Mu. Ins. Co., 7 *La. An.* 684). Our statute expressly requires the employment of a pilot (*Laws* 1857, c. 242, § 29, p. 501). See also 3 *Kent* 175, note C; and Bolton *v.* American Ins. Co., tried before Ch. J. JONES, Super. Ct. N. Y., Nov. 1835.

II. The liability of the defendant to contribute in general average for the deck load, depends upon establishing a usage. An insurance does not reach goods on deck, unless expressly mentioned (Lenox *v.* United States Ins. Co., 3 *Johns. Cas.* 179). No usage was shown that these articles, *i. e.*, rosin and kerosene, were usually carried on deck, and as some of them were stowed below, there is no basis to hold the underwriters liable for those on deck (Taunton Copper Co. *v.* Merchants' Ins. Co., 22 *Pick.* 108).

III. The defendant was exempt under its policy from liability for leakage. The clause of the policy invoked is "not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel" (Nelson *v.* Stephenson, 5 *Duer*, 544; *Emerigon on Ins.* [Meredith's Translation], 312). The reason why the underwriter has exempted himself from risk of leakage is stated in Neilson *v.* Com. Mu. Ins. Co. (3 *Duer*, 455), in which case the clause was the same as in the case at bar.

IV. The language of the policy should be construed in its ordinary sense with reference to the known modes of packing fluids, whether in wood, metal or glass, and any method by which the contents escape from the case without voluntary opening of the package must be taken to be leakage. This might seem a little strained in the case of glass vessels, where a breakage of the article would be the only method of escape, except through the opening provided. Upon the evi-

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dence tin cases are peculiarly liable to rust, and the effect of such rust is to produce apertures through which the contents would escape; they are soldered, and have no opening provided for the withdrawal of the contents, and where there can be no escape of the contents except through imperfections in the manufacture or those resulting from the decay of the substance, it would seem that the expression "leakage" would necessarily cover any escape of the contents.

The plaintiff was bound to establish his case as to leakage, not only as to the loss having occurred through the peril insured against, but also how much that loss was. The language of the policy, "Not liable for leakage, &c.," is a method of describing what risks the defendant would be liable for. And the attempt to make an exception of these words is not sustained by any authority. As to the risks which the defendant did not assume, the plaintiff remained his own insurer, and might have insured these risks in some other company. And in a controversy between himself and this defendant and such other company, he would be bound to establish as to each that the loss claimed was within the particular class of risk which the separate policies insured (*Phillips Ins.* § 1136). The question as to the burden of proof has been considered in the following cases: Heebner *v.* Eagle Ins. Co., 10 *Gray* [*Mass.*] 143; Baker *v.* Manufacturers' Ins. Co., 12 *Gray*, 608; Paddock *v.* Com. Ins. Co., 104 *Mass.* 52, 534; Cory *v.* Boylston Ins. Co., 107 *Mass.* 144.

Owen & Gray, attorneys, and *Frank Sturges*, of counsel, for respondent, among other things, urged:— I. The fact that the vessel did not take a pilot on leaving the port of New York does not avoid the policy (1 *Phillips Ins.* §§ 226, 717, *et seq.*; Flanigan *v.* Wash. Ins. Co., 7 *Penn.* 307; Blanchard *v.* N. J.

Steamboat Co., 59 *N. Y.* 295; Keeler *v.* Firemans' Ins. Co., 3 *Hill*, 250; McMillan *v.* Union Ins. Co., *Rai. R. S. C.* 249). It is only necessary that the vessel be guided out of port by a person of competent skill; and what better proof of compentency can there be than that the master of the *Hunter* took her from New York to South America in safety?

II. It was for the jury to determine whether the loading of a portion of the cargo on deck without the knowledge of the plaintiff was willful, and therefore barratrous. These questions the jury have determined in plaintiff's favor, and he is therefore entitled to recover under the policy for such barratry the insured value of the cargo jettisoned from the deck (Atkinson *v.* Great West. Ins. Co., 65 *N. Y.* 531; 2 *Whart. Ev.* § 1070, and notes).

III. The loss sustained upon the two thousand four hundred and four cases of kerosene sold at auction, was not leakage within the meaning of the policy. (1) Conditions and exceptions are to be construed strictly against the insurer. They are the words of the insurer, and they take a particular risk out of the policy, which, but for the exception, would be comprehended in the contract. They tend to narrow the range and limit the force of the principal obligation (Yeaton *v.* Fry, 5 *Cranch*, 535; Hoffman *v.* Ins. Co., 32 *N. Y.* 405; Welts *v.* Ins. Co., 48 *Id.* 34; Frichette *v.* Ins. Co., 3 *Duer*, 190; Colt *v.* Ins. Co., 54 *N. Y.* 595). Special clauses may or may not refer to every species of merchandise. If they do not refer to a particular class of articles, then as to such articles they are to be rejected as surplusage (Harper *v.* Ins. Co., 17 *N. Y.* 194; Babcock *v.* R. R. Co., 49 *Id.* 491). (2) The word "leakage" in the clause in question is used in its ordinary commercial sense, to which it must be restricted in its application. It is used generally, and without specific reference to any class of merchandise,

and therefore has reference only to such articles as to which in its ordinary meaning it is usually applied. In its ordinary sense it has reference to that waste or diminution which usually occurs through inherent defects in the vessels, or through the qualities of the liquids themselves. Molasses in barrels, spirits in casks, and the like, are the articles to which the term has been generally and naturally applied; and in so far as such waste may be increased by a peril of the sea, the insurer may not be liable. (3) It is presumed that the defendant has received a premium adequate to the risk, and nothing but the most stern legal necessity should constrain the court to give the clause a construction which would nullify the policy, and render it a mere deception, instead of the protection the parties designed. If leakage, as used in this policy, means escape of kerosene under all circumstances, then the policy as an indemnity is worthless (Harper *v.* Insurance Co., 17 *N. Y.* 194). (4) The loss was not leakage within the proper and usual meaning of the term. Neilson *v.* Insurance Co. (3 *Duer*, 455), turned upon this point. (5) Moreover it was for the jury to say whether or not the loss was "leakage" in its proper sense (Neilson *v.* Insurance Co., *supra;* Young *v.* Insurance Co., 34 *Super. Ct.* 321; New York Belting, &c., Co. *v.* Insurance Co., 10 *Bosw.* 428; Cummins *v.* Insurance Co., 67 *N. Y.* 260; Cornish *v.* Insurance Co., 74 *N. Y.* 295; Jones *v.* Insurance Co., 51 *N. Y.* 318; Swinnerton *v.* Insurance Co., 37 *N. Y.* 174).

IV. The clause in question is an exception, and it is incumbent upon the defendant to bring the loss within the exception (St. John *v.* Insurance Co., 11 *N. Y.* 518). Where the clause was "not liable for any loss occasioned by the explosion of a steam boiler," see Hayward *v.* Insurance Co. (7 *Bosw.* 385); also see 1 *Phillips Ins.* §§ 1165, *et seq.;* and cases cited under III. The clause is a proviso avciding the defendant's

promise, which he has pleaded in his answer, and must prove. The burden is upon the defendant to show that the loss was leakage. (1) Perils of the sea embrace every species of damage to the goods at sea by the violent or immediate action of the wind or waves, and not comprehended within the ordinary wear and tear of the voyage (2 *Arnould Mar. Ins.* 681). We have shown a loss within the policy; the defendant must bring the loss within the exception (Wood *v.* Insurance Co., 46 *N. Y.* 421; 2 *Arnould Mar. Ins.* 1074; Holdsworth *v.* Wise, 7 *B. & C.* 798; 2 *Arnould Mar. Ins.* 1072, note; Ross *v.* Hunter, 4 *T. R.* 33; Young *v.* Insurance Co., 34 *Super. Ct.* 321; Van Valkenburgh *v.* Insurance Co., 70 *N. Y.* 605).

BY THE COURT.—SEDGWICK, Ch. J.—The seaworthiness of the brig *Hunter* was viewed on the trial in several aspects. The defendant's claim was that the deck load rendered her unseaworthy; first, simply from its situation upon the deck; second, because it overloaded her, and by its weight lessening her free-board, or height of side above the water, to an extent that made her unseaworthy. It is assumed that the plaintiff should not have recovered, unless the testimony established *prima facie* that the vessel was seaworthy (Moses *v.* Sun Mutual Ins. Co., 1 *Duer*, 159). I understand that case to mean, that the insured need, in the first instance, given only slight, perhaps general, testimony as to the seaworthiness of the vessel; but that, at the end of the testimony, it should appear affirmatively that the vessel was seaworthy, in the particular, if any, as to which there has been an attack. I think that, on the trial, there was evidence which supported the verdict of the jury, that the brig had enough free-board to make her seaworthy, and also, with some hesitation, that the situation of the load on deck did not make the vessel so unsteady that she was, therefore, unseaworthy.

Opinion of the Court, by SEDGWICK, Ch. J.

But I am of opinion that, under the special circumstances of the case, the situation of the deck-load called for explanation from the plaintiff, which was not given in other respects than have been noticed: "It is a general and an ancient rule of the law of shipping that goods shall not be carried on deck. The reasons for this are obvious—not only is cargo there placed more liable to loss, because, if waves swept the deck, it would be washed over; but it would greatly endanger both ship and cargo, as it puts the weight far from the keel, and, by raising the center of gravity, makes the ship less stable. It incumbers the deck, which might be a matter of grave importance in a storm" (2 *Parsons Mar. Ins.* 217). The facts showed that the deck-load, in this case, in the absence of proof to the contrary, incumbered the deck in such a manner and to such an extent that the movements of the crew, in navigating the vessel, were likely to be impeded, and especially so in case a storm should release the deck-load from its fastenings and it should roll or be thrown over the deck. It is not necessary to say that any deck cargo, irrespective of its quantity, kind, and shape, would be presumed to render the vessel unseaworthy. It is only intended to decide that this particular deck cargo called for explanation at least. I cannot find any satisfactory testimony in the printed case, as to the quantity of deck cargo. It appeared that there were at least one hundred and nine barrels of rosin and thirty-seven cases of kerosene on the deck. It did not appear in what way they were fastened or stowed, excepting that the mate testified that the barrels were stowed on their sides and the cases were as high as the barrels, and he thought there were a few cases on top of the barrels. That the deck was greatly incumbered is shown by the quantity, as well as by the further testimony of the mate. In his deposition, the following questions and answers appear:

"Q. How many barrels of rosin was there on deck? A. I can't tell you—don't recollect. Q. Was the deck full? A. There was a good many; no, it was not at all full. Q. How near full was it? A. I don't know; it was not all full; anyhow we had water casks on deck besides. Q. Was there room for any more cargo on deck than that which you had? A. I don't think there was? Q. You mean to say that there was no more room for any more cargo on the deck of that brig? A. We could have put more on. Q. How could you put more on it? A. Find room for it forward by the foreside of the house, perhaps. I don't know how many more barrels we could have put on deck. Very likely ten. I would not swear to ten or any number. I may put more than five, perhaps."

This being the state of the evidence, I think that the plaintiff should, at least, have shown affirmatively that the deck cargo was not likely to interfere with the due management of the brig.

The learned counsel for respondent agreed that it was a question for the jury, as to whether the stowing the cargo upon deck was not an act of barratry on the part of the master. Whatever pertinency this position, if well taken, might have upon the question that arose from the jettison of the deck cargo, and the liability of the defendants to pay for the loss of a deck cargo, I do not see that it has any relevancy to the inquiry whether the brig was seaworthy at the time the policy attached. That seaworthiness should exist, was a condition precedent to the insurers becoming bound in any way. No case is cited, nor is a principle urged, upon which it can be held that the fact of seaworthiness, as a condition precedent, is waived or ceases to be a condition, if the unseaworthiness has been created by the intentional wrong of the master. The implication that the insurer's contract, in respect of a seaworthy vessel, is not the less just in a case of insurance upon cargo

not owned by the ship-owner. The owner of the cargo, in effect, contracts that the vessel is seaworthy.

As to the effect of the cargo on deck on the navigation of the brig, no explanation was given. It was not shown that it was the custom or usage to carry deck cargo on voyages like this. There was no attempt to show that the deck cargo did not interfere, or was not likely to interfere, with the due management of the brig.

The defendants also claimed that the vessel was unseaworthy, because she took no pilot in sailing out of the port of New York. This point will be passed upon, under the case of Keeler *v.* Fireman's Ins. Co. (3 *Hill*, 250). A statute of the kind invoked by the defendants (*Laws* 1857, c. 242, § 29, p. 501), that all masters of foreign vessels, &c., shall take a licensed pilot, may perhaps, under the case last cited, be considered directory in certain respects; but the statute creates a presumption that such a vessel is not fitted to sail out of the port without a licensed pilot, especially when, as in the case of this port, it is the custom or usage for such vessel to take a pilot. To answer this presumption, and to show that there was seaworthiness, the insured must prove that the person who actually took the vessel out was acquainted with the navigation of the port, and possessed skill and capacity, proportioned to the difficulties, sufficient to make him a proper pilot. In the present case there was no proof of any previous knowledge of the difficulties of the port or of sufficient skill and capacity to avoid or overcome them on the part of the master of the brig, who took her to sea. The fact, that he navigated her safely on the particular occasion, did not tend to show any competency. He may have been a learner, or taken the risk for the first time.

On the question of general overloading, there was

evidence enough to uphold the finding that she was not unseaworthy therefrom.

The learned court submitted the questions that concerned the seaworthiness to the jury, in an impartial way; but I am of opinion that the evidence showed that the vessel was unseaworthy, in the particulars already noticed as sustaining such a claim, and that the motion to dismiss the complaint on that ground should have been granted.

The defendants were made responsible for the loss of the deck load. The plaintiff claimed that it had been jettisoned. The defendants insisted that the proof was that it had been washed overboard. Perhaps the protest contains the truth on the subject, but its contents were not in evidence. There was some testimony that the deck load had been intentionally thrown over to lighten the vessel, and it seems that the defendants are concluded by their acquiescence in a declaration on the trial by plaintiff's counsel, that it was agreed that one hundred and nine barrels of rosin and thirty-seven cases of kerosene were jettisoned. The circumstances of the jettison of this deck cargo raise questions, perhaps, that were not mooted upon the argument, and attention will be confined to an exception that relates to the charge on this subject. The counsel for plaintiff claimed that the insurers were liable for the value of the deck cargo thrown over, if the master was, in loading it upon deck, guilty of barratry. The court charged "that if the master of the vessel, having chartered his vessel for a full cargo under deck, and having given bills of lading for the whole cargo as being under deck, took a portion of the cargo on deck, such an act, if done knowingly and willfully, would be a willful wrong on the part of the master against the owner of such goods, which would constitute barratry." This was excepted to by counsel for defendants, and the ground urged on the appeal was, that, to be bar-

ratrous, the master's act must also be fraudulent. I am, however, of the opinion that the substance of the opinions in Atkinson *v.* Great Western Ins. Co. (65 *N. Y.* 532) does not necessitate the use of that word fraudulent. It is enough if the jury find that the wrong was done with a knowledge or consciousness that it was wrong, and that it was done willfully. I understand that case to assert, in effect, that willfully in that connection means that the act is done purposely as a breach of duty, rather than negligently, by omitting to consider that it is a breach of duty. Although I am of opinion that such is the right application of the case cited, nevertheless it must be recognized that there is a doubt of it.

It is proper to say here, that the charge referred to the barratry as being a wrong against the owner of the cargo jettisoned, and did not refer to it as being a willful wrong against the owner of the ship also. The matter may have some importance, because it may be questioned, how successfully need not be here said, that if it is only a wrong against the owner of the cargo, as being a violation of the bill of lading, or of some other implied contract, whether resort should not be had to the ship or ship-owners, rather than to the insurers. In the case of Atkinson *v.* Great Western Ins. Co. (*supra*), it can be observed that the opinion of the court considered the act of barratry that was alleged, to have been barratrous as to the owner of the ship, as well as to the owner of the cargo.

The court also charged that the burden of proving the amount of damage resulting from leakage alone is upon the defendants. To this an exception was taken. There can be no doubt that a great part of the loss occurred from the escape of kerosene through holes or crevices in the tin cans, or through imperfectly fastened joints, or joints that had been opened by accident or by shocks received on the voyage. There can

be no doubt, also, that the cans had received injuries from sea-perils, and which permitted the great part of this leakage. Neilson *v.* Commercial Mut. Ins. Co. (3 *Duer*, 455) decides that a clause like one in the present policy, which is, "not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel," comprises leakage caused by sea-perils insured against, as well as ordinary leakage.

Respondent's counsel argues that the word "leakage," in the clause, refers to a leakage from packages of a kind that theretofore had been usually thought of as liable to leakage, and which usually occurs through inherent defects, and not from cans in cases of kerosene, they being articles as to which leakage from inherent defects were not to be apprehended. The answer to this is two-fold. First, the word leakage, in the contract, must be construed to mean, leakage from whatever vessels it may occur. Second, from the evidence of the merchants in the case as well from general knowledge of what a tin can is, it appears that tin cans are, from their mode of manufacture, as liable to leakage as barrels.

It is further said that the loss to the plaintiff occurred from the damaged appearance of the cases of kerosene, rather than from a deficiency of the contents through leakage. The evidence is against this. The testimony of the merchants shows that valuations were placed upon the damaged cases with a regard to the quantity of the contents.

The plaintiff, on the trial, was bound to prove the amount of damage, under the stipulations of the contract. The burden of proof was upon him to prove the amount as well as the cause of action in other respects. In his case, it appeared that the amount he claimed was, to a great extent, made up of the value of kerosene that had leaked from the cases. He therefore

claimed to recover something that, according to views already taken, he was not entitled to claim from defendants. Under these circumstances, I do not think the defendants were bound to limit and describe this wrongful excess by showing how much leakage there was. The clause cannot be viewed as an exception in the contract from general liability. It was a limitation of liability, in respect of the consequences of perils of the sea, and the plaintiff was bound to show what consequences had happened, for which the liability actually existed. No doubt, on the facts, it might, in the absence of other proof, appear that a loss of a kind had happened that would make an insurer liable; and, in such case, the insurer would be bound to introduce sufficient testimony to show what the facts really were. It would be doubtful, then, whether the insurer would be bound to do more, in the first instance, than to show that the insured claimed for a damage not contemplated by the policy, without proving its quantity. "Excepted risks are sometimes, by the circumstances of the case, mingled with those insured against, so that it is not quite easy to say to which class the loss is owing. The general rule must be that the insurers are liable or exonerated, according as the leading principal cause of loss be one insured against or one that is excepted; and, in such a case, the burden of proof is on the insured to show definitely the amount of his loss by the peril insured against" (1 *Parsons Mar. Ins.* 620, citing Heebner *v.* Eagle Ins. Co., 10 *Gray*, 143). I am therefore of opinion that this exception should be sustained.

Judgment reversed, and new trial ordered, with costs of appeal to appellant, to abide the event.

SPEIR, J., concurred.

Appellant's Points.

FREDERIKE LAX, ADMINISTRATRIX, &c., APPELLANT, v. THE FORTY-SECOND & GRAND ST. FERRY R. R. CO., RESPONDENT.

Negligence—liability of street railroad companies.—Action for causing death, &c.—admissions of deceased as evidence.

The provisions of the act of April 2, 1850, in relation to the liability of railroad companies, for injuries to passengers while on the platform, &c., does not apply to street railroad companies.

Where there is a conflict of testimony as to whether the car upon a street railroad was stopped at the request of the deceased, and again negligently started while he was in the act of alighting, the case should go to the jury, notwithstanding that it appears the passenger was unnecessarily upon the front platform, and attempted to alight therefrom.

It seems, that admissions of the deceased as to the manner in which the accident occurred are competent evidence against his representative in an action brought for causing the death of the deceased.

Before SEDGWICK, Ch. J., and RUSSELL, J.

Decided December 6, 1880.

Appeal from judgment, dismissing complaint at the trial term.

The action was under the statute, for compensation, for the pecuniary injury to the next of kin of the intestate, from the death of the intestate, caused as alleged by the negligence of defendant's servants.

At the trial, the complaint was dismissed on the ground, that, by the preponderance of testimony, it appeared that negligence of the deceased contributed to the cause of the injury.

Lauterbach & Spingarn, attorneys, and *F. R. Minrath*, of counsel, for appellant, urged, among other things:—1. Where the question either of negligence

or contributory negligence depends on conflicting testimony of the witnesses, or inferences to be deduced from a variety of circumstances, it is a matter of right for the plaintiff to go to the jury (Wolfkiel *v.* Sixth Avenue R. R. Co., 38 *N. Y.* 49; Filer *v.* New York Central R. R., 49 *Id.* 47; Thurber *v.* New York, H. B. & F. R. R., 60 *Id.* 326; Roach *v.* Railroad, 58 *Id.* 626; Nichols *v.* Sixth Avenue R. R. Co., 38 *Id.* 131; Dunham *v.* Troy R. R. Co., 3 *Keyes*, 543; Scofield *v.* Hernandez, 47 *N. Y.* 313; Gonzales *v.* Central R. R. Co., 39 *How. Pr.* 407; Colt *v.* Sixth Avenue R. R. Co., 49 *N. Y.* 671; Belton *v.* Baxter, 58 *Id.* 415; Hackford *v.* N. Y. H. R. R. Co., 53 *Id.* 654; Smith *v.* Coe, 55 *Id.* 678).

II. Upon a motion for a nonsuit, that version of the evidence most favorable to plaintiff must be adopted (Cook *v.* New York Central R. R. Co., 3 *Keyes*, 476; Scofield *v.* Hernandez, 47 *N. Y.* 313; Gonzales *v.* New York & H. R. R. Co., 39 *How.* 407; Wolfkiel *v.* Sixth Avenue R. R. Co., 38 *N. Y.* 49; Ernst *v.* Harlem R. R. Co., 35 *Id.* 9, 42; People *v.* Roe, 1 *Hill*, 470).

III. The plaintiff's witness, Charles Glaser, testifies that the deceased asked the driver to stop; that the latter did stop, and that just as the deceased was about to alight, the driver started the horses, and the deceased fell from the car and was run over. Again, "the driver did not stop long enough for him, to give him a chance to get off." If this testimony is true, and for the purposes of nonsuit the court is bound to consider it as true, the defendant is liable (Poulin *v.* Seventh Avenue R. R. Co., 61 *N. Y.* 621; Nichols *v.* Sixth Avenue R. R. Co., 38 *Id.* 131; Sauter *v.* New York R. R. Co., 66 *Id.* 50; Keating *v.* New York Central R. R., 49 *Id.* 673; Maher *v.* Railroad Co., 67 *Id.* 52; Mullhado *v.* R. R., 30 *Id.* 370; Colt *v.* Railroad Co., 49 *Id.* 671).

IV. The notices introduced in evidence by defendant are not applicable to the case at bar, and can have no bearing upon it. The statute provides that "In case any passenger shall be injured while on the platform of a car, or on any baggage, wood, or freight car, in violation of the printed regulations of the company, posted up in a conspicuous place inside its passenger cars, then in the train, such company shall not be liable for the injury." (*a*) This statutory provision does not apply to horse railroads, but simply to steam railway cars. The terms "baggage, wood or freight cars," and "the cars then in the train," show that the intent of the legislature was clearly that it should not apply to horse railways, where such things as wood, baggage or freight cars or trains are unknown. Webster defines the word train as a continuous or connected line of cars or wagons on a railroad (*Webster's Dictionary*). (*b*) Such regulation would only be available if the injury occurred to the deceased while on the platform, which is not in accordance with the facts of the case at bar. It is a well established rule, that any authority given in violation of common law right must be strictly construed, and consequently the provision exempting a carrier from his common law liability for negligence, cannot be extended by construction (Maynard *v.* Syracuse R. R. Co., 71 *N. Y.* 180; Chase *v.* Lord, 77 *Id.* 1). The statute clearly applies to those cases only where the injury occurred while the injured person was on the platform. An injury occurring after he had left the platform is outside the scope of the provision. (*c*) The regulations of the company and the foregoing statutory provision are not available to defendant, on the ground that, according to plaintiff's evidence, the breach of it in no wise contributed to the injury (Briggs *v.* New York Central R. R., 72 *N. Y.* 30; Haley *v.* Earle. 30 *Id.* 208;

Buel *v.* New York Central R. R. Co., 31 *Id.* 314; Willis *v.* Long Island R. R. Co., 34 *Id.* 675).

V. It is not negligence, *per se*, to stand on or alight from the front platform of a horse car (Maher *v.* Railroad, 67 *N. Y.* 55; Willis *v.* Long Island R. R., 34 *Id.* 675).

VI. The acceptance of fare from the deceased, without objection to his remaining on the platform either by driver or conductor, constituted a relaxation of the rule and a waiver of the statutory immunity (Dunn *v.* Grand Trunk R. R., 58 *Me.* 187; Carroll *v.* New York & New Haven R. R. Co., 1 *Duer*, 580; Maher *v.* C. P. R. R., 67 *N. Y.* 52; 59 *Id.* 351; 49 *Id.* 47; 36 *Id.* 135; 37 *Id.* 287).

VII. The declarations and admissions of the deceased, after the accident, are not competent testimony for the defendant to prove the contributory negligence of plaintiff's intestate. Such declarations are not part of the "*res gestæ*" (*Abbott's Trial Ev.* 588, and cases there cited; Luby *v.* Hudson R. R. R. Co., 17 *N. Y.* 132; Whitaker *v.* Eighth Avenue R. R., 51 *Id.* 295; 1 *Greenleaf's Ev.* §. 110; *Abbott's Trial Evidence*, 588). Nor were the declarations of the deceased competent evidence as admissions against himself, for, "Where the beneficial as well as the legal right of action is in another than the injured person—as where a parent sues for injuries to his minor child—the admissions of the latter are not competent against the plaintiff, except as part of the *res gestæ* (Ohio Railroad Co. *v.* Hammersley, 28 *Ind.* 371; *Abbott's Trial Ev.* 589).

Ely & Smith, attorneys, and *Moses Ely*, of counsel, for respondent.

BY THE COURT.—SEDGWICK, Ch. J.—The facts, which it was held constituted contributory negligence on the part of deceased, were, that at the time of the

occurrence, he was standing on the front platform of a horse car of defendant, and attempted to leave it while it was in such motion that it was against common prudence to make the attempt. The learned counsel for the respondents argued that section 46 of the "Act to authorize the formation of railroad corporations, and to regulate the same," passed April 2, 1850 (3 *Edm. Stat.* 636), which provides, that "in case any passenger on any railroad shall be injured while on the platform of a car . . . in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury, provided, &c.," is to be applied to the car of a horse railroad. The peculiarities of the language seems to indicate the opposite of this, and no case has been cited which sustains the proposition.

The law to govern is declared in the case of Clark *v.* Eighth Avenue R. R. Co. (36 *N. Y.* 135): "It is the duty of the passenger, on getting on board of a car, to place himself in a safe position therein, if he is able to obtain such position, and it is no excuse for him to place himself in an unsafe one, that the persons in charge know that it is unsafe, and do not drive him therefrom, when the unsafety is known to the passenger. That riding upon the steps of a street car is less safe than a seat inside, requires no proof. It is obviously so." It may also be held, that standing upon a front platform is, as to certain risks, obviously unsafe. The court, in the cited case, further said, "that if the plaintiff made reasonable exertions to get inside of the car, and failed to do so, and was permitted by the driver and conductor to remain on the platform, he was not illegally there . . when it was impossible for him to get any other place."

In Ginna *v.* Second Avenue R. R. Co. (67 *N. Y.* 596), it was held, that under like circumstances,

although it may not be physically impossible to enter the car, riding upon a platform is not *per se* negligence, if the passenger cannot enter the car "without great and unreasonable discomfort to himself and to the prior occupants of the car." In both of the cited cases, the platform obviously exposed the passenger to a danger of the kind that was actually incurred, when there would have been no such danger to him, if he were inside of the car.

In the present case, the deceased, according to the evidence, was unnecessarily upon the front platform, and there was no evidence that he might not have seated himself in the car. By the rules that have been cited, he would have been guilty of negligence that forbade this action being maintained, provided the accident that happened was of a kind he obviously was more exposed to from being on the platform, than he would have been in the car. In that case, his position would have contributed to cause the accident.

But there was evidence in the case that would have justified the jury in finding that immediately before the accident he had asked the driver to stop; that the driver did stop the car; that the deceased began to alight, but before he had gained a footing on the ground, while he was in the act of alighting, the driver started the car negligently, and the negligence caused the deceased to be thrown down. If such were the facts, it cannot be held, as matter of law, that his having been standing on the platform contributed to cause the injury. If the car were motionless, the getting from the front platform was no more dangerous than getting from the rear platform would have been. This, I think, should be deemed a matter of law. He must get from one platform or from the other. Neither has greater safety than the other. He would not have a choice between a place of safety and a place of danger. If the car had motion, unless the testimony incontro-

vertibly showed that it was a dangerous motion, there would be a question for the jury as to whether in fact the motion was dangerous, and whether alighting from the front platform was not obviously more dangerous than alighting from the rear platform. Maher *v.* Central Park, N. & E. R. R. Co. (67 *N. Y.* 52), sustains in principle what has been said in reference to a motionless car.

The plaintiff was entitled to go to the jury upon the testimony of Glaser. The testimony opposed to his was not so overwhelming that the jury did not have a right to believe him. They could have inferred from his testimony that the car was at a stand when the deceased began to step down. It would have been, of course, a question, as in Maher *v.* Central Park, N. & E. R. R. Co. (*supra*), whether the deceased was prudent or negligent in his manner of alighting.

In the course of the trial, the defendant was allowed to prove certain declarations of the deceased soon after the accident, which were, in substance, that he jumped off the front platform before the car had lessened its motion. It was objected that this was incompetent, as against the plaintiff—who does not succeed to the action that the deceased might have had in his lifetime, but has an independent statutory action—and that it was hearsay testimony. I am of the opinion that they are admissible, as having been made by the deceased against his interest; he, of course, having full knowledge of the actual occurrence. (1 *Greenl. Ev.* § 147, *et seq.*). "The ground upon which this evidence is received is the extreme improbability of its falsehood (*Id.* § 148.)."

But on the point first noticed, I am of opinion there should be a reversal of the judgment and a new trial ordered, with costs of the appeal to the appellant to abide the event.

RUSSELL, J., concurred.

Statement of the Case.

COTTON W. BEAN, RESPONDENT, *v.* GEORGE W. EDGE, APPELLANT.

Sale of chattels—what constitutes.—Conversion—when person issuing process liable for.—Amendment of complaint—when may be allowed.

B., the lessee of certain premises, sub-let the same for the unexpired term, together with certain of his chattels thereon, by a lease providing as follows: that on performance of covenants and payment of rent (a large part of which was paid in advance by indorsed notes), B. would, at the expiration of the term, convey said chattels to the sub-tenant; that if a loss by fire occurred, B. was to receive out of the insurance money (the sub-tenant agreeing to keep the chattels insured), such proportion as the rent then due might bear to the whole rent, the balance to go to the sub-tenant; that upon default, re-entry could be made, and the chattels sold, and the rent due taken from the proceeds, the balance to go to the sub-tenant.

Held, that under the above agreement, B. did not part with title to the chattels; also, that a sale thereof by B. during the tenancy, unaccompanied by manual delivery, raised no presumption of fraud.

The sheriff, under a distress warrant authorizing him to "distrain the goods, &c., of the tenant," having taken the property of a third person, the party who issued the process (the defendant herein), caused the goods to be appraised under the statute (of New Jersey), and subsequently received the proceeds of the sale thereof.

Held, that the defendant thereby became liable for the conversion of the said chattels.

Upon the trial, plaintiff moved to amend his complaint to include interest on the demand, and the referee reserved his decision, no objection being made to his so doing.

Held, that an allowance of the amendment, made in the findings of the referee, was in time.

Before SEDGWICK, Ch. J., SPEIR and RUSSELL, JJ.

Decided December 6, 1880.

Appeal from judgment entered on report of referee, in favor of plaintiff.

Statement of the Case.

This was an action for damages, from an alleged unlawful conversion of plaintiff's goods and chattels, by defendant's intestate, in taking and selling them under distress warrants for rent, in the State of New Jersey.

The intestate was the ground landlord. He leased the premises to Moses H. Bean. Moses H. Bean leased them to one Ely, for the unexpired term, and also the goods, chattels and household furniture in the house. These chattels were those afterwards taken by the distress warrants. Moses H. Bean, in the lease by him, agreed that on payment of rent and performance of covenants, at the expiration of the term he would sell and convey to Ely, by a good bill of sale, all the goods and chattels. If there was a loss by fire, Moses H. Bean was to receive out of insurance money (Ely agreeing to keep the goods insured), such proportion as the amount then due for rent would bear to the whole rent, and the rest of the insurance money to go to Ely. Right to re-enter upon default was reserved, and if there were re-entry, the chattels were to be sold at public auction, and from the proceeds, the rent due was to be paid, and the overplus to go to Ely.

The greater part of the rent was paid in advance by notes of Ely, indorsed by a third person. Moses H. Bean transferred some of these notes to the plaintiff, and the latter, after they had been due for some time, re-transferred them. About a year before the ground lease and the other lease were to expire, Moses H. Bean made and delivered to the plaintiff a bill of sale of "all my right, title and interest in and to" the chattels. The plaintiff paid to Moses H. Bean, as a consideration of this bill of sale, or of the transfer of the note, the sum of $3,000.

Rent being paid due to the ground landlord (the intestate of defendant), he made and placed in the hands of a constable, distress warrants, that on their

Opinion of the Court, by SEDGWICK, Ch. J.

face, empowered the constable "to distrain the goods and chattels of Moses H. Bean," in the premises leased as above "for rent due me for said premises."

A statute of New Jersey was read, empowering landlords to distrain, for rent due them, the goods of their tenants, and not of any other person, which may be found upon the demised premises.

Marsh & Wallis, attorneys, and *Luther R. Marsh*, of counsel, for appellant.

Erastus New, for respondent, among other things, urged:—The acts of the defendant constituted a conversion of the property in question (Latimer *v.* Wheeler, 3 *Abb. Ct. App. Dec.* 42; Boyce *v.* Brockway, 31 *N. Y.* 490; Allen *v.* Crary, 10 *Wend.* 349; Wintringham *v.* Lafoy, 7 *Cow.* 736; Woodside *v.* Adams, 11 *Vroom* [*N. J.*] 417).

BY THE COURT.—SEDGWICK, Ch. J.—The answer in this action admits that the defendant's intestate, who was in being at the time of the answer, caused the goods to be appraised, under the statute, and the testimony shows that he thereafter received the proceeds of the sale. This, besides other reasons that need not be specified, establishes the fact that he was responsible for the taking of the goods.

The answer, also, after setting out the statute of New Jersey, was that the goods taken were the property of Moses H. Bean, and were distrained for rent due by Moses H. Bean. It is not avowed that they were the goods of Moses H. Bean's lessee,—that is, of Ely, distrained for rent due by Ely; so that any argument that Ely was the owner of the goods would not, under the New Jersey statute, justify their being distrained for rent due by Moses H. Bean. But the defendant, perhaps, has a right to maintain in this action, that the plaintiff did not own the goods at the date of the

distress, and is not entitled to recover for their value, but that Ely did. That position calls for examination.

The plaintiff claimed to show his ownership of the goods, by his proof that Moses H. Bean had assigned and transferred them to him a year before the distress warrant was issued. Assuming that the defendant had a *status* that would enable him to impeach the bill of sale, as fraudulent against the landlord, that question was not, in fact, litigated upon the trial; it was not presented to the referee upon the trial; nor was any request made concerning it. On the trial, the contest was that Moses W. Bean's bill of sale did not transfer the goods to the plaintiff, because Ely's interest in them was of a kind that amounted to a title, or in some way took the title out of Moses W. Bean.

It cannot be questioned that if, at the time of the distress, the goods seized were not the goods of the tenant, Moses W. Bean, but had theretofore been so transferred to the plaintiff that they had become his goods, the distress was forbidden by statute of New Jersey, and was a trespass.

The remaining matter to be examined then is, was Ely's interest in the goods such that Moses W. Bean could not transfer them to the plaintiff? There is no doubt that before Moses W. Bean's lease to Ely, the former was the owner of the goods, and had unlimited power of disposition over them. That lease did not convey the goods. On the contrary, it expressly provided for a bill of sale to Ely at the end of the term, on condition, that at that time there should be no default by Ely in payment of rent or performance of covenant. Ely's rights as to the goods did not extend to his becoming the owner of them, under any other circumstances. If they should be burned, and he had performed his covenant to insure them, he would be entitled to an interest in the insurance money. If there were default in the rent, the lessor, Moses H.

Bean, might, at his option, repossess himself of the goods and sell them at public auction, and from the proceeds pay the rent due, and pay the rest to Ely. All this gave no title to Ely. Whatever was the exact nature of Ely's interest, including a right to possession, the title and the property remained in Moses H. Bean. The transfer of that title would not affect the rights of Ely, so long as the person having title was ready to use it as Ely's right required it should be used. Ely would enforce his right, not by reason of any interest in the property or power of disposition over it, but simply by reason of the personal obligation of Bean or his transferee, to do the things covenanted to be done. This is perhaps taking an extreme view of the obligations of Bean's assignee. I see no reason to doubt that Ely's interest did not operate to deprive Moses H. Bean of his right or power to sell the property to the plaintiff, and therefore the referee was correct in finding that the plaintiff was the owner of the property that had been taken by the intestate's distress warrant, as the property of Moses H. Bean.

No doubt is thrown upon the operation of the bill of sale, as transferring the property, by the fact that manual delivery of the property was not made. Actual delivery could not be made, as it was in the possession of Ely rightfully. It may be said further that in such case there was no presumption of fraud, it not being in the actual possession of the vendor.

If the propositions already made are sound, the declarations of Ely that were admitted as evidence on defendant's exception were immaterial, and did not injure the defense. On the undisputed evidence, it appeared that Moses H. Bean had been the owner of the goods. The declarations of Ely did not affect the testimony that Bean had made the bill of sale to the plaintiff. They only tended to show that Ely had voluntarily abandoned his interest, and that interest,

Statement of the Case.

we have held, did not impair the plaintiff's title or the title of Moses H. Bean.

I think it sufficiently appears that the defense made no objection to the referee's reserving his decision, upon the motion of plaintiff to be allowed to amend the complaint so that it should demand interest, and that his allowance of the amendment was in time, being made in his findings.

Judgment is affirmed, with costs.

SPEIR and RUSSELL, JJ., concurred.

JOHN B. DAY, AS ASSIGNEE, &C., RESPONDENT, *v.* ELIAS BACH, ET AL., APPELLANTS.

Conversion—when will lie for taking of goods under process.—Attachment.

Where an attachment regularly granted upon competent evidence is vacated upon appeal, for error alone, and not upon the ground of irregularity or for want of jurisdiction,—in the absence of proof of malice upon the part of the party obtaining the process, action will not lie against him for conversion of the goods taken thereunder.

Cases in which the process was void, or had been set aside for irregularity, distinguished.

Before SEDGWICK, Ch. J., and RUSSELL, J.

Decided December 6, 1880.

Appeal from judgment in favor of plaintiff, entered on verdict of a jury, and also from the order denying defendant's motion for a new trial, made upon the minutes.

The action was by the plaintiff, as general assignee of one Scheuer, for the benefit of the latter's creditors.

Appellants' Points.

The complaint charged a wrongful taking and conversion, by defendant, of Scheuer's goods.

On the trial it appeared that the defendants had begun an action in the supreme court on an account stated, and that, in such action, they applied for and obtained an order of attachment. The affidavit on which this order was made justified an inference that Scheuer was about to dispose of his property with intent to defraud his creditors. There was no irregularity in the attachment, or in the proceedings to obtain it. Scheuer moved, at special term, upon additional affidavits, that contradicted essential parts of the affidavit on which the attachment was issued, and explained others, to set aside attachment, but not on any ground of irregularity. The motion was denied. On appeal this order of denial was reversed, and the attachment was vacated.

The taking of the goods under the attachment was the wrongful conversion alleged in the complaint. The complaint did not charge that the defendants acted maliciously or without probable cause.

The defendant's counsel moved to dismiss the complaint on the ground that the evidence disclosed no cause of action.

The motion was denied, and the judge left to the jury to find only the value of the goods taken. Exceptions were made to the denial of the motion, and to the charge that the only question was the value of the goods.

Lawrence & Waehner, attorneys, and *L. C. Waehner*, of counsel, for appellants, urged:—I. This action was not in the nature of a suit for a malicious prosecution. It is not charged that the defendants maliciously, and without probable cause, procured the warrant of attachment to be issued and levied. The ground upon which the plaintiff claims to recover is,

that the warrant of attachment having been set aside upon the merits, for error in fact, affords no justification for the proceedings taken under it during its life.

II. The appellants concede that had the attachment been vacated for want of jurisdiction in the court, or because of any irregularity in their proceedings, or because of their failure to present to the court sufficient facts to justify the issuance of the warrant, in the first instance, they would be liable as trespassers for all acts done thereunder. But neither of those facts exist in this case.

III. There is a vital difference between erroneous and irregular process. Erroneous process is the act of the court, and even after it is set aside or reversed, whatever was done under it while in force may be justified by the party. Irregular process is the act of the party, and when once set aside, is considered as having been a nullity from the beginning (Blanchard *v.* Goss, 2 *N. H.* 491; Palmer *v.* Foley, 71 *N. Y.* 109; Miller *v.* Adams, 52 *Id.* 415; Waldo *v.* Selden, 4 *Week. Dig.* 370; Simpson *v.* Hombeck, 3 *Lans.* 53; Sleight *v.* Ogle, 4 *E. D. Smith*, 445; Waldheim *v.* Sichel, 1 *Hilt.* 45; Coupal *v.* Ward, 106 *Mass.* 289; 3 *Daly*, 38; 1 *Hill on Torts*, 437, 443, 444). The process in this case, being erroneous and not irregular, afforded a complete protection for all acts done under it, and the court at the trial should have so held. A party suing out process from a competent court is responsible only for its validity and for his own good faith in causing it to issue (Adams *v.* Freeman, 9 *Johns.* 117).

IV. It not being claimed that the defendants maliciously, and without probable cause, procured the attachment to issue, nor that any acts were done in excess of those authorized by the writ, the plaintiff cannot recover in this action. The presence or partici-

pation of the defendants in the levy does not render them liable, the process being valid.

V. It may perhaps be suggested that it is a great hardship to a party to have his property attached without a remedy for the damage which may be occasioned by the execution of the process, and that, if the plaintiff is nonsuited in this action, he is remediless. This suggestion is not, however, entitled to any consideration, as it has been completely answered by the court of appeals, in the case of Palmer *v.* Foley (71 *N. Y.* 108).

Cooper & Bach, attorneys, and *S. V. R. Cooper*, of counsel, for respondent, among other things, urged :— Defendants contend, First: That the facts show that the goods were taken under an attachment, and if there was a trespass or conversion it was by the sheriff. Second: That the warrant of attachment having been vacated for error and not for irregularity, it was a protection to these defendants for any act done by the sheriff under it. Neither of the above propositions is true. The sheriff was protected by the warrant of attachment, but the defendants were not (Wehle *v.* Butler, 12 *Abb. Pr. N. S.* 139 ; affi'd, 61 *N. Y.* 245 ; Lyon *v.* Yates, 52 *Barb.* 237 ; Kerr *v.* Mount, 28 *N. Y.* 659). The counsel for the defendants claimed, on the trial, that the attachment not having been set aside or vacated for irregularity, but for error, it is a protection to the defendants in this action against any act done by the sheriff under it ; and then cites several cases. The case of Palmer *v.* Foley has no application to this action. In that action an injunction was granted ; the action was discontinued by consent. An order was made appointing a referee to ascertain defendant's damages by reason of the injunction. The court of appeals held, "There is no breach of the condition of the statutory undertaking, unless the court finally decides that the

plaintiff was not entitled to the injunction, or unless something occurs equivalent to such a decision. The point in this case did not arise in the case of Palmer *v.* Foley. And it does not appear, by the order of the general term vacating the attachment, whether it was vacated for error or for irregularity. The case of Miller *v.* Adams (52 *N. Y.* 409), is not in point. It was an action for false imprisonment. Adams had obtained a judgment against one Thompson, execution had been issued and returned, no goods. The plaintiff, Miller, had been ordered to appear before a county judge to be examined as a debtor to Thompson, or as having property belonging to him. Miller disregarded the order, and an attachment was issued against him, under which he was arrested. It was claimed by Miller that the county judge had no jurisdiction to issue the attachment, for the reason that the affidavit upon which the proceedings were instituted was insufficient. The court of appeals held the affidavit was sufficient, and that the county judge had jurisdiction. The case of Waldo *v.* Seldon (4 *Weekly Dig.* 370), was an action for false imprisonment, and arose out of proceedings supplementary to execution, and has no application to the present case. Simpson *v.* Hornbeck (3 *Lans.* 53), is also a case of false imprisonment, and has no application. The sheriff is protected by the warrant of attachment, and if the defendants are not liable, then it follows that there is no means or remedy by which property attached and converted can be regained, or the value thereof recovered, if attachment be vacated. Money collected on a judgment, which is afterwards reversed, either for error or irregularity, can be recovered back (Simpson *v.* Hornbeck, 3 *Lans.* 53, 56).

BY THE COURT.—SEDGWICK, Ch. J.—The court issuing the attachment had jurisdiction for that purpose, and there was no irregularity in the proceeding. The

affidavits on which the attachment was made disclosed evidence of a competent kind, establishing, in the absence of explanation, one of the cases in which the statute provides for an order of attachment. Malice was not alleged against the defendants, or charged against them on the trial.

Chitty says, of actions of this kind, that "case for the malicious motive and want of probable cause for the proceeding is the only sustainable form of action" (1 *Chitty Pl.* 186).

Reynolds *v.* Kennedy (1 *Wils.* 232), was an action for damages, in causing the defendant's property, some barrels of brandy, to be seized under the revenue law. In the first instance, the plaintiff's information was sustained and the property condemned, but this was reversed on appeal. The court held that the action for damages would not lie, there being no charge or proof of malice. It was said the "gist of this sort of action arises from some evil practice or malice in him who sues or prosecutes" (Pangburn *v.* Bull, 1 *W.* 346; also cases cited in note a, § 11, c. 16, 1 *Hill's Torts*).

In Beaty *v.* Perkins (6 *Wend.* 381), it was held that trespass would not lie against a party who has procured a search warrant to search for stolen goods, if the warrant be duly issued and regularly executed, and it was thought that case would lie if the party has no grounds for his proceedings, and is actuated by malicious motives.

In 1 *Saunders* (230, b), the law is broadly stated: "And the rule seems general that no action lies for damage or inconvenience sustained in consequence of process of law, unless it be alleged and proved that the party who occasioned it was actuated by malice."

In Simpson *v.* Hornbeck (3 *Lans.* 53), the defendant had obtained a judgment for the conversion, by the plaintiff, of personal property, and the plaintiff was taken by an execution against his person, issued

on the judgment. The judgment was afterwards reversed, and the plaintiff brought the action for false imprisonment. Judge PARKER, in giving the opinion of the general term, said, "although a void judgment, or one that is voidable for irregularity, will not, after being set aside, justify the acts of the party, done under it, before it was set aside, this principle, I apprehend, has never been applied to a judgment merely erroneous, and reversed for error by a court of review." He cites other cases.

In the cases cited by respondent's counsel to maintain this action, Wehle *v.* Butler (61 *N. Y.* 245, affirming 35 *Super. Ct.* 1), Lyon *v.* Yates (52 *Barb.* 237), Kerr *v.* Mount (28 *N. Y.* 659); and in Smith *v.* Shaw (12 *Johns.* 257), Chapman *v.* Dyett (11 *Wend.* 31), the processes were either void or had been set aside for irregularity.

In substance, if a party were held liable for the cause here alleged, the liability would exist, although he was guilty of no omission or violation of duty to the law or to the individual. If there were damage, it would be *damnum absque injuria.*

For these reasons, I am of the opinion that the defendant's exceptions upon the trial, require a new trial.

Judgment and order appealed from reversed, and new trial ordered, with costs of appeal to appellant to abide event.

RUSSELL, J., concurred.

Statement of the Case.

LOUISA M. FURNISS, RESPONDENT, *v.* THE MUTUAL LIFE INSURANCE COMPANY OF N. Y., APPELLANT.

Life insurance—effect of false statement in application—what sufficient evidence of falsity.

Where the husband, as the agent of his wife, and in her name, obtains a policy of insurance upon his life, warranting the truth of his statement in the application that he is of correct and temperate habits, and making the same a part of the policy, a statement of the wife in a verified petition thereafter made by her in an action for separation, that ever since their marriage he had been addicted to the excessive use of intoxicating liquors, is admissible in evidence against her, in an action on the said policy, and if such admission is not explained or contradicted, a verdict for defendant should be directed.

What answer to questions in application will constitute a declaration of correct and temperate habits, and what is sufficient evidence of such habits in deceased, as against an admission such as the above, considered by the court.

Before SEDGWICK, Ch. J., SPEIR and RUSSELL, JJ.

Decided December 6, 1880.

Appeal by defendant from judgment.

The action was on a policy of defendant that insured, for the benefit of the plaintiff, her husband's life.

On the trial, the testimony showed that the application for the policy was made by the husband for the plaintiff, and in her name, and her name was signed to it by him as her agent. The application contained the following questions: "Q. (A) Are your habits of life correct and temperate? (B) Have they always been so?" and the answer was; "Yes. Drink at times."

Appellant's Points.

At the end of the testimony, the defendant's counsel claimed that the plaintiff had, by the policy, warranted the answer in the application to be true; that by uncontradicted evidence, the answer was untrue; and moved for a verdict for defendant. The motion was denied, and exception taken.

Further facts appear in the opinion.

Fullerton, Knox & Crosby, attorneys, and *William Fullerton*, of counsel, for appellant, among other things, urged:—I. "If there is a stipulation that the habits of an applicant are sober and temperate, it is sufficient to avoid the policy for the defendants to show that his habits were intemperate, and it is no answer to this plea to prove the intemperance not to have been such as to have injured the health of the insured, or to shorten his life" (Southcombe *v.* Merriman, 1 *Cov. & Marsh.* 286; Jeffries *v.* Franklin Ins. Co., 22 *Wall.* 47; Mut. Benefit L. Ins. Co. *v.* Holterhoff, 2 *Cin.* 379; *Bunyan*, 45). To prove the representations untrue as to his habits at the time of taking out the policy, it is only necessary to offer the petition of the plaintiff herself, in an action against her husband for a limited divorce, made under oath, and which contains the following allegations: "That ever since the said marriage between the plaintiff and defendant, the said defendant has been addicted to the excessive use of intoxicating liquors, causing him to be very frequently in a drunken and irresponsible condition of mind. That such drunkenness has very much increased in frequency within the last two years." This petition was sworn to on April 30, 1877. The plaintiff was married to her husband in 1865, and the policy issued on September 10, 1874, nearly ten years thereafter. Although, in answer to the question "Are your habits of life correct and temperate?" he answered "Yes; drink at times," yet the latter phrase does not, in any degree, qualify the answer

Respondent's Points.

"Yes." The meaning of the whole answer is that while he drinks at times, "Yet his habits of life are correct and temperate." By the phrase "drink at times," he did not mean to convey to the company that he indulged in the use of intoxicating liquors to such an extent as to impair his health.

II. The assured also alleged and promised that he did not then, and that he would not in the future, practice any pernicious habit that obviously tended to shorten life. This was a promissory warranty that was, as appears from the petition of the wife and from other testimony, broken, whereby the policy was made void (*Bliss Life Ins.* § 44; also p. 61; *Angell on Ins.* § 150; *Arnold on Ins.* § 192). The statement of an intention to do a certain act in answer to a question upon an application for a policy of fire insurance, is equivalent to an agreement to perform such act upon the happening of the event upon which it was contingent (Bilborough *v.* Metropolis Ins. Co., 5 *Duer*, 587; Fowler *v.* Ætna Ins. Co., 7 *Wend.* 270; Dunning *v.* Chenango Co. Mut. Ins. Co., 2 *Den.* 75; Stout *v.* Fire Ins. Co. of N. H., 12 *Iowa*, 371). The insurance company had an object in incorporating the provision in the policy of insurance, that the insured should not practice any pernicious habit which obviously tends to shorten life. That clause was meant to perform some office. It formed a part of the declaration of the applicant, and which declaration it was mutually agreed should form the basis of the contract of insurance. If, then, the declaration that the assured would not practice any such habit, was the basis of the contract of insurance, how can the contract stand if the basis is destroyed?

C. E. & D. B. Ogden, attorneys, and *John E. Parsons*, of counsel, among other things, urged:—
I. Answers to questions in the application are not to

be extended beyond their fair meaning. The answer to the question, "Are your habits of life correct and temperate?" was not unqualified. He did not answer simply Yes. The words "drink at times" qualified yes, or were unmeaning. And of that qualifying effect, the jury were the judges (Edington *v.* Ætna Life Ins. Co., 13 *Hun*, 543; Swift *v.* Mass. Mutual Life Ins. Co., 2 *N. Y. Sup'm. Ct.* 302; Higgins *v.* Phenix Mutual Life Ins. Co., Ct. App., May 21, 1875, 7 *Ins. L. T.* 788; Baker *v.* Home Life Ins. Co., 64 *N. Y.* 648; Edington *v.* Mutual Life Ins. Co., 67 *Id.* 185; Fitch *v.* Am. Pop. Life Ins. Co., 58 *Id.* 557; Dilliber *v.* Home Life Ins. Co., 69 *Id.* 656). "If a question is not answered, it is not a warranty that there is nothing to answer (Liberty Hall *v.* Ins. Co., 7 *Gray*, 261). Warranties in policies of insurance are strictly construed. They will not be extended to include anything not necessarily implied in their terms (Loud *v.* Insurance Co., 2 *Gray*, 221; Campbell *v.* Id., 98 *Mass.* 381; Hide *v.* Bruce, 3 *Doug.* 213; Fowkes *v.* M. & L. Life Ass. Assn., 3 *Best & Smith*, Q. B. 917).

II. It was a question for the jury whether Leon Furniss's habits tended obviously to the shortening of life, and there was an abundance of evidence on the part of the plaintiff to be submitted to the jury. The question of intemperance is eminently one for the jury (Rawlins *v.* Desborough, 2 *Moody & Rob.* 328; McGinley *v.* U. S. Life Ins. Co., Ct. App. [June, 1879], 8 *Ins. Law*, 3,538; Fox *v.* Ins. Co., 4 *Dig.* 458).

BY THE COURT.—SEDGWICK, Ch. J.—On the trial, it appeared that the plaintiff intermarried, in 1865, with Leon Furniss, whose life was insured by the policy in action. The plaintiff, on April 30, 1877, swore that a certain petition made by her in an action against her husband, was true of her own knowledge, except such matters as were therein stated on information and

belief, and that as to such matters, she believed the petition to be true. That petition contained the following assertions: "That ever since the said marriage of the plaintiff and defendant, the said defendant has been addicted to the excessive use of intoxicating liquors, causing him to be very frequently in a drunken and irresponsible condition of mind." These assertions are at variance with the declarations made by the application of the plaintiff for the insurance; for it is clear that the answer made by the husband to the questions in that regard contained in the application, means that he drank at times, in such quantity as still to leave him with correct and temperate habits of life. The application was made September 9, 1874.

The petition of the plaintiff, that has been referred to, was evidence in the case as to the habits of life of Furniss, at the time of the application. The declarations of the petition were an admission, which, when compared with the answers that have been given, clearly shows that the latter did not give the fact as to his habits. The plaintiff testified that the language of the petition was the language of the lawyer who drew it, but she did not assert that the facts were not truly described by that language.

This admission, nevertheless, the plaintiff was at liberty to explain or to show to have been incorrect by evidence sufficient for that purpose. There was no explanation of the petition. She did not testify what facts she communicated to her lawyer, nor that the petition did not allege the facts as she had said they were, nor that she did not understand the meaning of the language. She did not testify to any facts that would tend to show that the application was true rather than the petition, or that the petition was incorrect. I have looked carefully at the testimony of the other witnesses, to find if their testimony tended to show that the petition was incorrect. A very small

portion of the testimony refers to a time that embraces the date of the application, but that part is not inconsistent with the admission of the plaintiff made in her petition. The evidence on this point that was given by the witnesses who spoke as to the year 1874, was no doubt correct. The facts they described would not have justified a position that the deceased's habits of life was not correct or temperate in 1874. But such facts were not inconsistent with actual intemperance, not known to them, or with a knowledge by plaintiff of facts that she specified and implied in her petition. As there was nothing that contradicted plaintiff's declaration, sworn to by her, that ever since the marriage the deceased had been addicted to the "excessive use of intoxicating liquors, causing him to be very frequently in a drunken and irresponsible condition of mind," and nothing that explained it, it must be held, that, like all other uncontradicted testimony, it required a disposition of the cause in accordance with it.

The plaintiff had not personally signed the application, but she had contracted with the company, that the contents of it were true. The policy runs, "In consideration of the statements and representations, or either of them, made and submitted to its officers, &c., and contained in the application for this policy (which application and all the statements and representations therein contained, &c., are hereby approved and adopted by the applicant, and are warranted to have been true when made, and are by the parties referred to, and made a part of this contract).* By the application, it was affirmed and declared by the plaintiff, "the applicant above named," that the answers are true and correct, and expressly stipulated and agreed

* In Barteaux v. Phœnix M. L. Ins. Co. (67 *N. Y.* 595), it is held that a warranty in an insurance policy must be true, whether material or not.

Statement of the Case.

that the "above application and this declaration" shall form the basis of the contract, and that if untrue answers have been made, the said policy shall become null and void.

For these reasons, I am of opinion that the motion to direct a verdict for defendant should have been granted.

I am of opinion, that the disposition of the case in other respects was correct.

Judgment reversed, and new trial ordered, with costs of the appeal to the appellant to abide the event.

SPEIR and RUSSELL, JJ., concurred.

ANN HEALEY, APPELLANT, *v.* THE DRY DOCK, EAST BROADWAY & BATTERY RAILROAD COMPANY, RESPONDENT.

I. NEGLIGENCE.

1. CONTRIBUTORY, WHAT IS NOT.

(*a*) A plaintiff's own negligence, or want of ordinary care and caution *is not* contributory, *unless* but for such negligence or want of ordinary care and caution, the collision resulting in injury to the plaintiff would not have happened.

1. Where *a defendant*, after becoming aware of plaintiff's danger by observing the condition and peril of plaintiff, *could*, by the exercise of reasonable care and prudence, *have avoided the collision*, the negligence, &c., of the plaintiff is *not contributory:* in such case, it cannot be said that the collision would not have happened but for the negligence, &c., of plaintiff.

1. The fact that one has placed himself in a place of danger, can never be an excuse for another carelessly or recklessly injuring him.

II. APPLICATION.

1. The plaintiff was crossing a street-car track, carrying on one of her shoulders two large bundles, of such size and in such position

Statement of the Case.

as to obstruct both her hearing and vision on the side of an approaching car, the near horse of which struck her down, and one of her feet was injured by one of the car wheels. The evidence was conflicting on the question, as to whether the driver, after his being apprised of plaintiff's imperiled and crippled condition, could, with ordinary care, precaution and diligence, have stopped the car in time to prevent the injury.

Plaintiff's counsel requested the court to charge the jury substantially in accordance with above principles. The court refused so to charge, and verdict passed for defendant.

HELD,

error; the evidence warranted the requests.

Before SEDGWICK, Ch. J., SPEIR and RUSSELL, JJ.

Decided December 6, 1881.

Appeal is only from an order denying a motion on the judge's minutes, under section 999 of the Code, for a new trial.

The action charged the defendant with negligence through its servants, for damages for personal injuries to plaintiff, and resulted in a verdict for the defendant.

It appears that the plaintiff, a woman fifty-four years of age, while in the act of crossing Canal street, a little west of Mott street, was knocked down by the near horse of the team attached to one of defendant's street-cars, which was then going westerly on the northerly railroad track in Canal street, and one of her feet injured by one of the car wheels. The plaintiff, prior to the accident, was employed in picking hair which is used for mattrasses, cushions, &c., and on this occasion had obtained, from a store on the south side of Canal street, two rolls of hair about three feet long and a foot and a half thick, weighing about twenty-eight to thirty pounds each. These rolls were placed on her right shoulder, one on top of the

other, and their dimensions and position were such as to obstruct both her vision and hearing on the side which was the direction the car was coming. Other facts will appear in the opinion.

O. P. Buel, attorney, and of counsel, for appellant, urged:—The requests state a correct rule of law, or, more specifically, a correct rule of evidence, relevant to the testimony in the case; and the court erred in refusing to charge the rule, as requested, for the guidance of the jury, in their consideration of the testimony.

I. It is not enough, to defeat plaintiff's right of recovery, that her negligence placed her in a position of peril, or remotely contributed to the injury. It must appear that her negligence proximately contributed to the injury. It is not enough that she was negligent in not looking out for approaching vehicles, before attempting to cross the street (as stated by the learned chief justice in his charge). If defendant's driver was notified of her negligence and her peril in time, by reasonable care on his part, to avert a collision and the consequent injury, and failed to exercise such reasonable care, then the question of plaintiff's prior negligence is eliminated from the case, and the defendant becomes liable by reason of its driver's negligence.

"It may be said (in the language of Judge COOLEY), that in such a case the negligence of the plaintiff only put her in a position of danger, and was therefore only the remote cause of the injury, while the subsequent intervening negligence of the defendant was the proximate cause (*Cooley on Torts*, 674; Burham *v.* St. Louis & I. M. R. Co., 56 *Mo.* 338; Austin *v.* New Jersey Steamboat Co., 43 *N. Y.* 75, 82; Green *v.* Erie R. Co., 11 *Hun*, 333; Card *v.* Harlem R. Co., 50 *Barb.* 39; Steele *v.* Burkhardt, 104 *Mass.* 59; *Wharton on Neg.*, § 388; *Shearm. & Redf. on Neg.* §§ 25, 33, 36,

and cases cited and notes; Thirteenth & Fifteenth Streets Pass. R. Co. *v.* Boudron, 10 *Reporter*, 156).

II. The expression, "contributory negligence," is so general, that in many, perhaps in most cases, it requires explanation according to the circumstances of the case, in order to guard a jury against misconceiving its import (*Shearm. & Redf. on Neg.* § 25, note 4; Tuff *v.* Warman, 5 *C. B.* [*N. S.*] 573, 584; COMPTON, J., criticises the expression as "much too loose").

III. The learned chief justice, on the trial, distinctly charged the jury, that if the plaintiff omitted to look for the approaching car "before attempting to cross the street," "she was guilty of contributory negligence, which defeats her right of action. This statement, unqualified or unexplained, could scarcely fail to mislead the jury. But even if it were doubtful simply, whether the jury might not have been misled, it was error for the court to refuse to charge the qualification of the rule, expressed in the requests to charge (Weber *v.* Kingsland, 8 *Bosw.* 447, WOODRUFF, J.; Sayre *v.* Townsend, 15 *Wend.* 647; Chapman *v.* Erie R. Co., 55 *N. Y.* 587, CHURCH, Ch. J.; Vedder *v.* Fellows, 20 *Id.* 129, 130; Bisling *v.* Third National Bank, 10 *Reporter*, 410). In Culhane *v.* New York Central & H. R. R. Co., Judge ALLEN says: "The remark of the judge was very liable, unexplained, to mislead the jury. . . . It was, therefore, error for the judge to refuse to charge as requested. The refusal deepened the impression made upon the minds of the jury by the evidence, and the general instructions given them" (60 *N. Y.* 136).

IV. The requests were relevant to the testimony.

Robinson & Scribner, attorneys, and *John M. Scribner*, of counsel, for respondent, urged:—I. The plaintiff's exceptions were not well taken. To sustain these exceptions would annihilate the doctrine which

has always maintained in this class of cases, that a plaintiff who seeks to recover damages for personal injuries alleged to have been caused by defendant's negligence, must be free from fault himself (Ernst *v.* Hudson R. R. Co., 24 *How. Pr.* 97, 103; Deyo *v.* New York Central R. R., 34 *N. Y.* 9, 14; Button *v.* Hudson R. R., 18 *Id.* 248-257; Wilds *v.* Hudson R. R. Co., 24 *Id.* 432; Grippen *v.* N. Y. Cen. R. R., 40 *Id.* 51; Hale *v.* Smith, 78 *Id.* 480; Warner *v.* New York Cen. R. R. Co., 44 *Id.* 471; Mangam *v.* Brooklyn R. R. Co., 36 *Barb.* 237, EMOTT, J.; Owen *v.* Hudson R. R. Co., 7 *Bosw.* 329; S. C., affirmed, 35 *N. Y.* 516; McGrath *v.* New York Cen. R. R. Co., 59 *Id.* 470; Reynolds *v.* New York Cen. R. R., 58 *Id.* 250; Cordell *v.* New York Cen. R. R., 75 *Id.* 332; Stackus *v.* New York Cen. R. R., 7 *Hun*, 559).

II. Plaintiff's exceptions were not well taken, because there was no evidence on which the jury could have justly found that the car driver was apprised of the plaintiff's peril "at such time that the injury might have been avoided by the exercise of reasonable care and prudence on his part," or that he "could have stopped the car before the front wheels struck the plaintiff's foot." Assuming, for the sake of argument, but against the authorities, that plaintiff's requests to charge contained correct propositions of law, it was not error for the judge to refuse to charge the same, because the evidence would not justify the jury in finding that the car driver could have done any more than he did to avert or lessen the injury suffered by the plaintiff (Rushmore *v.* Hall, 12 *Abb. Pr.* 421; Pratt *v.* Ogden, 34 *N. Y.* 22; Rouse *v.* Lewis, 4 *Abb. Ct. App. Dec.* 121; Hope *v.* Lawrence, 50 *Barb.* 262; Schwerin *v.* McKie, 5 *Robt.* 422; Kiernan *v.* Rocheleau, 6 *Bosw.* 148, 153). The jury having been properly instructed in respect to everything necessary to a proper disposition of the case, the judge was under no

obligation to make any further charge, even if the plaintiff's requests, as abstract propositions, had been correct (Moody *v.* Osgood, 54 *N. Y.* 494; Kissenger *v.* New York & Harlem R. R., 56 *Id.* 542).

III. Upon all the evidence in this case, and after the clear and careful charge delivered by the judge, the jury must have found that there was no negligence on the part of the car driver, and that the accident resulted from the plaintiff's own negligence. The jury were instructed, that, to entitle the plaintiff to recover, they must be satisfied "there was no negligence on her part," and if "the injuries received by the plaintiff resulted wholly or partly from her failure to observe an approaching car, which she could have seen by looking, then she cannot recover, no matter how great had been the negligence of the car driver." The plaintiff took no exception to this nor to any other part of the judge's charge. It is respectfully submitted that, if the charge was correct, the propositions requested to be charged by the plaintiff were wholly incorrect. And to establish the accuracy of the judge's charge in this respect, and likewise to maintain our own position, that it would have been error to have charged the propositions requested by the plaintiff, we ask the attention of the court to some of the more recent authorities relating to the duty of pedestrians and others to look both ways before attempting to cross a city street or railroad track. "It was the legal duty of the plaintiff, in crossing the avenue, to exercise reasonable care to protect herself from injury by a collision with vehicles that were traveling thereon" (Barker *v.* Savage, 45 *N. Y.* 192; Gorton *v.* Erie Railway Co., 45 *Id.* 664; Ernst *v.* Hudson R. R. Co., 35 *Id.* 9; S. C., 39 *Id.* 61; Beisiegel *v.* New York Central R. R. Co., 34 *Id.* 625; Havens *v.* Erie Railway Co., 41 *Id.* 296; Davis *v.* New York Central R. R. Co., 47 *Id.* 400; Mitchell *v.* New York Central R. R. Co.,

2 *Hun*, 535; Reynolds *v.* New York Central R. R. Co., 58 *N. Y.* 248; Salter *v.* Utica, &c. R. R. Co., 75 *Id.* 276; Belton *v.* Baxter, 54 *Id.* 247; Belton *v.* Baxter, 58 *Id.* 411; Stevens *v.* Oswego, &c., R. R. Co., 18 *Id.* 423; Ernst *v.* Hudson River R. R. Co., 39 *Id.* 68; Stakus *v.* New York Central R. R. Co., 7 *Hun*, 561; Wilcox *v.* Rome, &c. R. R. Co., 39 *N. Y.* 358; Grippen *v.* New York Central R. R. Co., 40 *Id.* 34; Nicholson *v.* Erie Railway, 41 *Id.* 541; Baxter *v.* Troy & B. R. R. Co., 41 *Id.* 503; Harty *v.* Central R. R. N. J., 42 *Id.* 473; Sutherland *v.* New York Cen. R. R. Co., 9 *J. & S.* 17, 29; McGrath *v.* New York Cen. R. R. Co., 59 *N. Y.* 470; Mitchell *v.* New York Cen. R. R. Co., 2 *Hun*, 538; Davis *v.* New York Central R. R. Co., 47 *N. Y.* 401; Weber *v.* New York Central R. R. Co., 58 *Id.* 455; Salter *v.* Utica & Black R. R. Co., 75 *Id.* 276; Cordell *v.* New York Central R. R. Co., 75 *Id.* 332).

IV. The plaintiff was not a passenger, and hence the stringent rules of law which govern as between carrier and passenger have no relation to this case. The defendant owed no duty to the plaintiff, except the exercise of ordinary care, and in that respect "no more care can be required of street railway companies in the management of their cars and horses in the street than is required of the driver or owner of any other vehicle" (Unger *v.* Forty-second Street R. R. Co., 51 *N. Y.* 502).

BY THE COURT.—SPEIR, J.—The only question which the plaintiff's appeal brings before us for review, are the exceptions taken to the refusal of the learned judge to charge as requested by the plaintiff.

The requests are as follows:

1. "Even if the jury believed plaintiff before crossing neglected to look for an approaching car, or was in any other way guilty of negligence so as to place her-

self in peril of injury, yet if defendant's driver was apprised of the peril at such time that the injury might have been avoided by the exercise of reasonable care and prudence on his part, the plaintiff is entitled to a verdict."

2. "If at any time after it became apparent to defendant's driver that a collision was inevitable, or if, after the horses actually struck the plaintiff, the driver could have stopped the car before the front wheel struck the plaintiff's foot, having failed to do so, the plaintiff is entitled to recover."

The law in these cases of negligence is now well settled in this country and in England.

The first proposition is general, and to the effect, that the plaintiff in an action for damages caused by the negligence of another cannot recover, if the jury find that he himself has been guilty of negligence or want of ordinary care which contributed to *cause* the injury.

There is a qualification of this rule (which is as well settled as is the general rule), that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him.

The principle is stated in *Wharton on Negligence*, section 303: "In order to defeat the recovery of damages arising from defendant's negligence, the plaintiff's negligence must have been the proximate and not the remote cause of the injury; in other words, must be its judicial cause and not merely one of its conditions." As applied to this case, if the plaintiff was negligent by not looking with sufficient care, or, notwithstanding she saw the car approaching, she negligently or carelessly started across the street, expecting to clear the northerly track before the car reached the westerly side of Mott street, did her negli-

gence contributed to the injury, if the defendant's driver, after he became aware of her danger by observing her condition and peril, could have averted the collision and the consequent injury? It cannot be said that the remote negligence of the plaintiff would protect the defendant, whose proximate negligence was the judicial cause of her injury. The fact that one has placed himself in a place of danger, can never be an excuse for another carelessly or recklessly injuring him. It may be said in such a case, the negligence of the plaintiff only put her in a position of danger, and was therefore only the remote cause of the injury, while the subsequently intervening negligence of the defendant was the proximate cause. The following cases and authorities may be relied upon in support of the doctrine: Davis *v.* Mann (10 *Mees. & W.* 546); Button *v.* Hudson River R. R. Co. (18 *N. Y.* 248); Austin *v.* New Jersey Steamboat Co. (43 *N. Y.* 75); Radley *v.* London & N. W. R. R. Co. (1 *E. L. R. App. Cas.* 754); *Shearm. & Redf. on Neg.* and cases cited in section 36; Steele *v.* Burkhardt (104 *Mass.* 59); Card *v.* Harlem R. Co. (50 *Barb.* 39); Thirteenth and Fifteenth Streets Passenger R. R. Co. *v.* Bondon (Sup. Court Term, Feb'y, 1880, 10 *Reporter*, 156, Aug. 4, 1880.)

It appears to us that there was a question for the jury in this case, as to whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or whether the plaintiff herself so far contributed to the misfortune by her own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter she could not, as, but for her own fault, the misfortune would not have occurred.

The contest on the trial was, whether the car could have been stopped in time by the defendant's servant,

with ordinary care and precaution, to prevent the accident, when the driver discovered the plaintiff's imperiled and crippled condition. The learned judge in his charge to the jury speaks of the testimony bearing on the point as conflicting in its character. This is apparent from all the facts and circumstances as related by the witnesses, which are brought to bear on the question in controversy—as to speed the car was going—the distance the car was from the plaintiff when the driver first saw the plaintiff—the statements of both the driver and conductor conflicting with those of other witnesses in the case, and especially one witness who was on the platform at the left of the driver, who testifies "that the driver first cried out and put the brakes down, and nearly arrested the motion of the car, and then loosened them and started on again when the horses' heads were within eight feet of the plaintiff"; other witnesses testifying "that this was not so, that he put the brakes down and stopped the car just as it reached the foot of the plaintiff, who was thrown by the shoulder of the near horse, and that the horses were partly wheeled round from the car."

It is admitted that the position and dimensions of the rolls of hair which the plaintiff carried on her right shoulder, one on top of the other, were such as to obstruct both her vision and hearing on the side of the approaching car. And no witness has testified that she did or could have ascertained whether a car was aproaching from that side. Whether she did or not depends upon inferences to be drawn from other facts, which are not conclusive. So as it regards other conflicting facts as to the position of the car and the conduct of the driver. In such a case it is the province of the jury and not of the court to find the facts and draw the inferences.

Enough appears from the case to show that the requests to charge were relevant to the testimony.

Opinion of the Court, by SPEIR, J.

The learned judge charged, "If you find from the evidence that the injuries received by the plaintiff resulted wholly or partly from her failure to observe an approaching car which she could have seen by looking, then she cannot recover, no matter how great had been the negligence of the car driver." Again, that if the plaintiff omitted to look for the approaching car, "before attempting to cross the street, she was guilty of contributory negligence, which defeats her right of action." The charge comes within the general rule in regard to negligence as before defined, but it wholly omits to recognize the rule which is strictly applicable to the case in hand. This could hardly fail to mislead the jury. The point in controversy on the trial was not in fact submitted to them, but withdrawn from their consideration by the statement, "that her failure to observe the approaching car, which she could have seen by looking, she could not recover, no matter how great had been the negligence of the car driver." It was therefore error to refuse to charge the qualification of the rule expressed in the requests to charge.

The order appealed from should be reversed and a new trial granted, with costs to abide the event.

SEDGWICK. Ch. J., and RUSSELL, J., concurred.

Statement of the Case.

DAVID C. CARLETON, v. THOMAS DARCY AND THE MAYOR, &c., OF N. Y.

Lease—how executed by City of New York.—Ejectment—possession sufficient to maintain—when landlord may defend.—Proceedings for taking private property, etc.—must be strictly followed—when acts for unconstitutional.

A lease of lands (the title to which the city of New York claims under chapter 246 of Laws of 1839, and chapter 150 of Laws of 1834), purporting to be made by the "mayor, aldermen, etc., acting by the commissioners of the sinking fund," as lessor, and which is signed by the comptroller with his name and official title, is improperly executed and void.

It is sufficient to maintain an action of ejectment against the lessee in such a case, that the plaintiff was in actual possession at the time of entry under the lease; and if in such an action the city be allowed to interpose an answer, it cannot defend, if the relation of landlord and tenant is not shown to exist between it and the defendant.

It seems, that in proceedings for the taking of private property under said acts of 1839 and 1834, the supreme court acts as a court of limited jurisdiction, and, to show title thereunder, all the steps prescribed by the statute must be proved to have been taken.

It seems, that unless the legislature have the grounds of the application, showing the necessity and the public use of the lands to be taken, laid before it and incorporated in the act, such act is unconstitutional and void,—*e. g.*, said acts of 1839 and 1834.

Before SPEIR and RUSSELL, JJ.

Decided December 6, 1880.

The plaintiff brings the action in ejectment against the defendant, Darcy, to recover possession of a lot of land in the city of New York, on the north side of One-Hundred-and-Twentieth street, twenty feet in front, by one hundred feet in depth; the easterly side of the lot being one hundred feet from Third avenue.

Darcy claimed to be lessee of the city, and the

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Mayor, Aldermen, &c., on their application, were joined as defendants, and had leave to answer.

Under the direction of the court, the jury found a verdict for the plaintiff, subject to the opinion of the court at general term.

Further facts appear in the opinion.

H. B. Philbrook and *George F. Betts*, for plaintiff, urged :—I. The plaintiff Carleton having been in possession of the premises at the time of his dispossession by Darcy, that is *prima facie* evidence that Carlton had the fee in these premises (Day *v.* Alverson, 9 *Wend.* 223 ; Smith *v.* Lorillard, 10 *Johns.* 338, 356 ; Griffin *v.* Spencer, 6 *Hill*, 525 ; 2 *Greenl. Ev.* § 618 ; Whitney *v.* Wright, 15 *Wend.* 171 ; Christy *v.* Scott, 14 *How. U. S.* 282). The possession of Carleton complied with all the requirements of the law. He had the land enclosed by a substantial enclosure (*New Code*, § 372 ; *Code Pro.* § 85 ; 2 *R. S.* p. 294, § 84). If part of the fence was occasionally down for a few days, it did not destroy the continuousness of the occupancy (Whitney *v.* Black River Ins. Co., 72 *N. Y.* 117 ; Hermann *v.* Merchants' Ins. Co. [Super. Ct.], 8 *W. Dig.* 19).

II. (*a*) The mayor, aldermen, &c., cannot set up any defense except through Darcy (2 *R. S.* 342, § 17 [*Edm. Ed.* 352] ; Godfrey *v.* Townsend, 8 *How. Pr.* 402). Unless the relation of landlord and tenant is shown to exist, the mayor, &c., cannot defend (Jackson *v.* Stiles, 6 *Cow.* 594 ; People *v.* Webster, 10 *Wend.* 554). (*b*) Darcy's only claim is as a lessee from the mayor, aldermen, &c., and that claim cannot be sustained, for even if the mayor, &c., had title to this property, they held it in trust for public uses, and cannot dispose of it without express power conferred by act of the legislature (Brooklyn Park Com'rs *v.* Armstrong, 45 *N. Y.* 234 ; Matter of Boston, &c. R. R. Co. 53 *N. Y.* 576 ; St. Vincent Asylum *v.* City of Troy, 76

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N. Y. 108; Matter of N. Y. and Brighton R. R. Co., 9 *Week. Dig.* 387). But the act of 1839 does not give any such power. If this was market property (and as such, if at all, the city held it), it could not be leased except on condition that the lessee shall maintain the same "as and for the purposes of a public market, for at least ten years from and after such lease" (Act of 1873, ch. 335, § 102). This lease to Darcy contained no such clause. The Board of Commissioners of the Sinking Fund had the only authority to give such a lease, if such power existed (Act of 1873, ch. 335, § 102). But that board has never executed any lease to Darcy, nor is it averred in the answer that they did. The lease does not name them as lessors (Clarke *v.* Courtney, 5 *Pet.* 319). The execution of the lease is only individually by "Andrew H. Green" (Kirsted *v.* The O. & A. R. R. Co., 69 *N. Y.* 343; Orchard *v.* Binninger, 51 *N. Y.* 652; Sherman *v.* N. Y. C. R. R. Co., 22 *Barb.* 239; Coombes Case, 9 *Co. R.* 75; Isham *v.* Bennington Iron Co., 19 *Vt.* 230; Brinley *v.* Mann, 2 *Cush.* [Mass.] 337. (*c*) Title in a stranger,- *-i. e.*, the mayor, &c.,—is no defense to Darcy (Christy *v.* Scott, 14 *How.* 282; Jackson *v.* Hardee, 4 *Johns.* 202). The mayor, aldermen and commonalty never assented to or ratified the trespass of Darcy upon Carleton's possession. The commissioners of sinking fund have no other power than to "sell or lease," and then "at public auction or by sealed bids," not to sanction an intrusion (Taylor *v.* Beebe, 3 *Robt.* 262; *In re* Carlton St., 16 *Hun*, 497).

III. Even if the mayor, &c., are admitted to defend on the strength of their title, or if Darcy can avail himself of that defense, there is no title nor right of possession shown in them. (*a*) The city acquired no title under the act of 1839. That act is unconstitutional, as it is not an act providing for taking private property for public use. It contains no recital to that

effect. There is no proof substantiating any such intent. It stands as a taking of private property for private use. "The existence of a necessity for legislative action will not be presumed when the facts which would create it are neither shown by proof nor recited in the statute" (Powers *v.* Bergen, 6 *N. Y.* 358; *Re* Cherry St., 19 *Wend.* 677; 11 *Wend.* 148). In Hayward *v.* Mayor of New York (7 *N. Y.* 314), the act recited the "public use," and the court treats it as an *agreement.* And to the same effect is 45 *N. Y.* 234, where the corporations are decided to hold property thus acquired upon the *trust* to use it *for the purpose* for which it was acquired. The city is now selling and leasing this property for private use. And there is no averment even in the answer that it was taken for public use. (*b*) The decree of the supreme court on which the city relies for its title is invalid. The court had no jurisdiction to make such a decree. In this matter it acted as a court of special and limited jurisdiction, and every step prescribed by the statute must be shown to have been taken (2 *Cow. & Hill's Notes*, 946; Morse *v.* Williamson, 35 *Barb.* 472; Striker *v.* Kelly, 7 *Hill*, 9; 2 *Den.* 323; Staples *v.* Fairchild, 3 *N. Y.* 41; Brown *v.* The Mayor, 3 *Hun*, 685; *In re* Marsh, 71 *N. Y.* 315). And the recitals in the record are not conclusive evidence of the facts they recite (Bolton *v* Jacks, 6 *Robt.* 198; App. Ferguson *v.* Crawford, 70 *N. Y.* 253). (1) The court had no jurisdiction, because there was no application to it by the mayor, &c. Such application being acquired by the act, is therefore the necessary basis of jurisdiction (Sharp *v.* Speir, 4 *Hill*, 76; *In re* Marsh, 71 *N. Y.* 315; *In re* Valentine, 72 *N. Y.* 184; Town of Willsborough *v.* N. Y. & Canada R. R. Co., 76 *N. Y.* 182). (2) The court had no jurisdiction to make the order of confirmation, because the provisions of the act of 1834 have not been complied with, which require that "at least fourteen

days before making their report to the court they [the commissioners] shall deposit a *true* copy or transcript thereof in the clerk's office of the city of New York, &c., &c. Failure to comply with these provisions is a fatal defect (Cases above cited, and Stanton *v.* Ellis, 12 *N. Y.* 575, 579; People *v.* Sutherland, 8 *Week. Dig.* 3; *In re* Carlton street [Ct. of Appeals], 9 *Week. Dig.* 164; *In re* Burmeister, 76 *N. Y.* 174; Thompson *v.* Commissioners, &c. [Ct. of Appeals], 21 *Alb. Law J.* 15, 16). (*c*) Title in, or possession by, the parties who are named in the report of the commissioners as owners of the land must be proved before any foundation is laid for the title that the city claims under and through them (Kennedy *v.* Bogert, 7 *Serg. & R.* 97). (*d*) The city acquired no title by adverse possession. Occupancy as a park is not adverse possession, for that is only an easement, and is not adverse to the fee, but subordinate to it (Anderson *v.* Lockport & N. F. R. R. Co., 9 *How. Pr.* 553; De Witt *v.* Village of Ithaca, 7 *Week. Dig.* 533; Jackson *v.* Hathaway, 15 *Johns.* 447; Van Amringe *v.* Burnett, 8 *Bosw.* 357; People *v.* Kerr, 27 *N. Y.* 188; Redfield *v.* Utica & Syracuse R. R. Co., 25 *Barb.* 54). An easement is limited to its prescribed use, and cannot be enlarged beyond that (Prentice *v.* Geizer, 74 *N. Y.* 341; 2 *Washburn R. E.* 308 [52]; *Washburn Easem'ts.* 185, 186; Brooks *v.* Curtis, 4 *Lans.* 284). (*e*) If the city ever had possession of the lot in question, it abandoned that possession, and therefore cannot rely upon it. It was left by the city as open common, except the buildings on the corner of One-Hundred-and-Twentieth street and Third avenue, during the last eight or nine years. Possession is thus shown to have been abandoned by the city (*Washburn Easemts.* ch. 5, § 5, subd. 9, p. 667 [548]: "The cesser to use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as a release, with-

Respondent's Points.

out any reference to the time during which such cesser has continued." 3 *Kent Comm.* 450; Cartwright *v.* Maplesden, 53 *N. Y.* 622; Corning *v.* Gould, 16 *Wend.* 531; Whitney *v.* Wright, 15 *Wend.* 171),

Wm. C. Whitney, counsel to the corporation, and *T. B. Clarkson*, assistant to corporation counsel, for the mayor, &c., among other things, urged:—I. (*a*) The land must be deemed to have been taken for public purposes, although neither the act nor the report says anything on that subject—nor even as to what use was to be made of the land (*Mills Eminent Domain*, §§ 10, 11). (*b*) The report of the commissioners (in a proceeding to take private property for public use as a street) is a judgment, and conclusive as to all questions litigated, or which might have been litigated therein (Dolan *v.* Mayor, 62 *N. Y.* 472; Matter of Arnold, 60 *Id.* 26–28; Embury *v.* Conner, 3 *Id.* 511–522, 528). (*c*) The parties whose land was taken had their day in court; but there was no objection by anybody on the ground that the property was not taken for a public use. (*d*) The evidence in the case shows that the land was, in fact, devoted to public uses during all the time we can get any accurate account of its history since the city acquired it. It was used to build thereon a public market and engine houses, and was used as a public park. There is testimony covering almost the whole time from the time the city acquired it down to 1869, and all the uses of it by the city were public uses, and no use other than a public use on the part of the city has been shown. (*e*) The mere fact that the legislature authorized the corporation of the city of New York to take the property was a declaration that the property was to be taken for public purposes. The city could not take it for any other purpose. It was not authorized to do so. It could not hold the property merely for private gain (*Dillon on Municipal*

Corporations [2 ed. § 64]; City of Chicago *v.* Halsey, 25 *Ill.* 595; Merwin *v.* City of Chicago, 45 *Id.* 133; Darlington *v.* Mayor, 31 *N. Y.* 164–197). (*f*) Every presumption is to be taken in favor of the regularity of the proceedings. We are not bound to prove that the court had jurisdiction, and that its proceedings were regular. It would have been sufficient if the defendants had, in the first place, given in evidence the report of the commissioners and the order of confirmation. Then it would have been incumbent on plaintiff to prove, affirmatively, that the court did not have jurisdiction, had not acquired jurisdiction (Embury *v.* Conner, 3 *N. Y.* 511; Matter of Arnold, 60 *Id.* 26–28; Dolan *v.* Mayor, 62 *Id.* 472–5). And if the application for the appointment of commissioners, and the order appointing them, are not now to be found, yet, in the face of the order of the court, made thirty years ago, when the whole matter was fresh, this court cannot now say that they never did exist (Potter *v.* Merchant's Bank, 28 *N. Y.* 641).

II. The defendants, the mayor, &c., having shown a perfect title in fee, and undisputed possession down to 1869, the other defendant, Darcy, can stand on their title. If Darcy admits the validity of the contract between him and the corporation, and the sufficiency of its execution, the plaintiff cannot question it. His (plaintiff's) right does not depend on the validity of that contract. He must stand on the strength of his own case, not on the weakness of that of the defendants (2 *Greenl. Ev.* [13 ed.] § 331). Besides, if the contract in writing was insufficient, Darcy was a tenant at will or by sufferance—tenant at all events by the consent of himself and the owner of the fee—and entitled to stand on the landlord's rights.

BY THE COURT.—SPEIR, J.—It appears from the case that the plaintiff, in June, 1876, was in actual pos-

session of the lot in question, and had been since the preceding September, having it enclosed with a board fence with all the others included in the square bounded by One-Hundred-and-Twentieth street, Third avenue, One-Hundred-and-Twenty-first street and Sylvan place, except a plot in Third avenue one hundred feet in depth on One-Hundred-and-Twentieth street—being the south-east portion of the square. He had leased portions of this square to tenants, collected rents from them, erected buildings on different parts of the property, and asserted ownership to all the property so enclosed.

The testimony of the witnesses shows that the fence was occasionally taken down by persons in the neighborhood for short periods of time, still it is plain from all the evidence that the occupation was a continued one, and that the buildings were erected by the plaintiff under permits obtained from the city.

The action is brought against Darcy alone, who claims title as lessee from the mayor, aldermen, &c., who by the court were permitted to put in an amended answer to the complaint, and cannot therefore set up any defense except through Darcy. He had no title nor right to possession. Unless the relation of landlord and tenant is shown to exist between them, the mayor, &c., cannot defend the suit.

The main question in the case is, did that relation exist?

It is claimed by the defense that the city acquired title to a certain tract of land of which the land in controversy is a part under the act of 1839, chapter 246. This act declared that the corporation should become vested with the title to said tract by like proceedings as were prescribed by the laws of 1834, chapter 150, excepting the first and twentieth sections of that act.

Passing for the present that the act makes no provision for taking property for public use, and is there-

fore unconstitutional, I am of the opinion that the city's counsel have wholly failed to prove by their witnesses and the proceedings taken from the files of the court, that the city became and were seized in fee simple absolute of all the land described in the act. Assuming that the act conferred the power to take the steps claimed by the defendant, the decree pronounced by the supreme court was invalid.

In this matter the court had only a special and limited jurisdiction, and in such cases it is well settled that all its proceedings are of no avail unless every step prescribed by the statute is proved to have been taken. Unless a court has jurisdiction it can never make a record which imports incontrovertible verity to the party over whom it has usurped jurisdiction (Starbuck *v.* Murray, 5 *Wend.* 158). No court or officer can acquire jurisdiction by the mere assertion of it (People *v.* Cassels, 5 *Hill*, 165).

The act of 1834, chapter 150, section 2, prescribes that the proceedings are to be commenced "on application of the mayor, aldermen and commonalty to the supreme court; that the court or one of the justices to whom such application is made, shall appoint three disinterested persons, &c." It is plain that such application is the foundation of the limited jurisdiction conferred, and there is no proof that any such application was made by the mayor, &c. The provisions of the act of 1834 were not complied with in the necessary steps to be taken in the confirmation of the commissioners' report to the court, and failure to comply with these provisions was a fatal defect. In Matter of City of Buffalo (78 *N. Y.* 362), it is held that where power is delegated by the legislature to a municipal corporation to take the property of the citizen *in invitum*, all the prescribed prerequisites to the exercise of that power must be strictly observed and conformed to. In other words, it cannot be presumed that these re-

quirements have been met—the corporation must be able to show it. The answer sets up a lease dated April 3, 1876, which is put in evidence by the defendant, between the mayor, &c., acting by the commissioners of the sinking fund, and the defendant, Darcy, under which he claimed title. This lease is executed by Andrew H. Green, and not by the board of commissioners of the sinking fund, nor by the mayor, aldermen, &c. This lease has no validity and confers no title upon Darcy. It was not executed by the commissioners of the sinking fund, who appear upon the face of the lease to be acting as the agent of the city. Besides, Green, as an individual or as comptroller, had no authority to execute the lease.

The plaintiff, as we have seen, was in actual possession of the premises. This was enough to enable him to recover it from Darcy, a mere trespasser, who entered without any title. The plaintiff recovers on the strength of his own title and not on the weakness of the defendant's title, which is a rule applicable to all actions for the recovery of property (Christy *v.* Scott, 14 *How. U. S.* 292).

But it seems clear to us that the city acquired no title under the act of 1839, or the act of 1834, to which it refers, as no provision is made for taking private property for public use. There is nothing appearing upon the face of these statutes, or by the case, showing what facts existed to justify the legislature in enacting them, and thereby assuming to authorize the sale of the lands mentioned in them. If any necessity existed for the action of the legislature, the proofs are not furnished us, nor are they recited in the statutes. It is not claimed that the city used more than two or three lots of the whole square for a market, engine and hose companies, prior to 1862 or 1863, upwards of twenty years after the act was passed, or that it was used as a square more than six or seven years. In April, 1876,

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it undertook to lease the lot in controversy for private use. I am of the opinion that unless the legislature have the grounds of the application laid before it, showing the necessity and the public use of the land to be taken by the city, and incorporated in the act itself, the act is unconstitutional and void. Without these prerequisites, it is simply a transfer of one man's property to another without the consent of the owner, and though compensation be made when adjudged by the court, it makes no difference whether the transfer is made to an individual or a municipal corporation.

The legislature is asked to convey lands to the city in fee simple absolute. If this can be done without disclosing the public use, there is no restraint upon legislative power, and without this the legislature is absolute and can act independent of the restraints of the constitution.

Judgment should be entered for the plaintiff upon the verdict.

RUSSELL, J., concurred.

JOHN GRAY, RESPONDENT, *v.* THE MAYOR, &c., OF NEW YORK AND MICHAEL NOONAN, APPELLANTS.

Sale of chattels—when title passes.—Order upon fund due from city of New York—equitable assignment.—Real party in interest.

Where the price of certain specific chattels is fixed, and paid, *e. g.*, by orders upon a fund due the vendee from the city of New York, and delivery is to be made at a place designated by the vendee, nothing else remaining to be done by the vendor, the title passes absolutely without delivery.

An order drawn by one upon a fund due him from the city of New York, operates as an equitable assignment of the sum therein

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named, and the drawee is the real party in interest as to the city, although the contract under which the fund was earned provides that none of the moneys payable thereunder shall be assigned without the assent of the Commissioner of Public Works, which consent is not obtained; and though, after the order is presented, and before payment thereof, the drawer forbids the city to pay it.

Interest accrues upon such an order from the time it becomes due and payable.

Before SPEIR and RUSSELL, JJ.

Decided December 6, 1880.

Appeal from a judgment for the plaintiff against the Mayor, &c., entered on March 19, 1880, for $969.93, and against the defendant, Noonan, for the sum of $1,004.93.

The defendant, Noonan, had a contract with the Mayor, &c., to do work upon the Boulevard, for which work he was to receive the aggregate sum of $65,523.20. Payments by the terms of this contract were to be made at different times by installments. The fourth and fifth payments had become due and payable by August 26, 1879, before the commencement of this action. At this date the defendant, Noonan, had become indebted to the plaintiff in the sum of $787.50 for two engines, boilers and accompaniments, for which he gave two orders to the plaintiff, on the city, and against the funds in the hands of the city, the indebtedness exceeding the amount of the orders. The orders were delivered to the comptroller on the day of their date, and filed with the contract. The contract with the city was performed and payment of the orders was demanded when due, and refused—Noonan forbidding the city to pay.

William C. Whitney and *D. J. Dean*, for the city, appellant.

John H. Strahan, attorney, and *Thomas Allison*, of counsel, for Noonan, appellant.

Jacob F. Miller, for respondent.

BY THE COURT—SPEIR, J.—On March 26, 1879, Noonan became indebted to the plaintiff for the purchase price of two engines, boilers and accompaniments, for the payment of which he executed and delivered to the plaintiff the two orders set out in the complaint. This the trial judge has found, and we think the evidence fully sustains his finding. It is clear the articles were sold as second-hand at the time the price was fixed for their value, at the first interviews between the parties, and it was in the power of Noonan to have a personal inspection of them had he chosen to do so. In cases of sale of personal property, it is many times a nice and difficult question whether there has been a delivery, whether the title has passed. In this case the price was fixed and the delivery was to be made at a place designated by the buyer, and the consideration for the articles sold was paid to the plaintiff by the orders on the city. There was nothing else to be done by the seller after he had promised to deliver the articles, and the title passed absolutely without delivery. If it was the intention of the parties that the property should be deemed to be delivered and the title pass, it will be so held. This is the general rule of the common law (*Long on Sales*, 42; 2 *Kent*, 492; Simons *v.* Swift, 5 *B. & C.* 857). In this case the orders were received and delivered to the city a few days before the delivery of the articles sold. All this had been done before Noonan had made any complaint about the character of the goods purchased, or had notified the city not to pay. Under the circumstances there is nothing in the case to sustain the defendant's counterclaim.

Opinion of the Court, by SPEIR, J.

By particular request, the learned judge found that the contract with the city contained a provision to the effect that Noonan would not sub-let the aforesaid work without the previous written consent of the commissioner of public works indorsed on the agreement, but would keep the same under his own control; and that he would not assign by power of attorney, or otherwise, any of the moneys payable under this contract, unless by and with the previous consent of said commissioner of public works, to be signified by indorsement on the agreement; and that no consent to the foregoing assignment was given by the said commissioner, or indorsed on said contract.

It is contended by the counsel for the city, that it was the intent and purpose of the parties to the contract, by appropriate covenants, so to define their then relations, that either one may be protected from being subjected to the rights or liabilities of a creditor or debtor other than his co-contractor, by reason of the obligations assumed.

It is insisted that the covenant should be sustained by the court as matter of public policy for the protection of the public treasury, and that the city at the time of making the contract, made the provision, that no one should create any obligation other than the contractor, who was then known to them.

The plaintiff was the real party in interest, had a valid transfer as against the assignor, and holds the legal title to the demand. The defendant, the city, has no legal right to inquire further. And in fact, no such inquiry was made. No objection was made on the account of the provision in the contract in question at any time after, or when the orders were delivered to it. The city refused only because the assignor had notified it not to pay. From the undisputed facts in the case, the defendant would be protected if it paid to the assignee, or if a recovery was had against it by him. The

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city had the benefit of the contract with Noonan, lawfully made and fully executed, and became obligated by the orders given, which operated as equitable assignments of so much money in its hands for the benefit of the plaintiff. It could make no difference to the city whether it paid to the contractor to whom the money was due and owing, or to another, upon his order. It is not claimed that the contract with the city is illegal and contrary to the statutes of the State or ordinances of the city, nor were any secret arrangements made by any of the parties, by which the public treasury can possibly be affected.

Interest accrued from the time the orders became due and payable.

Judgment affirmed, with costs.

RUSSELL, J., concurred.

CHARLES STORRS AND AUGUSTUS STORRS, RESPONDENTS, *v.* THOMPSON J. S. FLINT, AND THE RUSSELL & ERWIN MANUFACTURING COMPANY, APPELLANTS.

I. TRUST DEEDS.

To carry on business theretofore carried on by the creator of the trusts, pay certain debts of the creator, and turn over the property.

1. POWERS OF TRUSTEE.

Certain premises and property (including among other things two factories), and the business connected therewith, were conveyed by D. to B., to be held, managed, and disposed of by him upon trust: (1) To pay the expenses of the business; (2) To pay certain other sums; (3) To pay to one T. J. F. S. four several sums of money with semi-annual interest, as represented by four several notes made by D. to said T. J. F. S., such notes bearing even date with the

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declaration of trust, and payable one year after date. If default should be made in the payment of any of such notes, or if the trustee should not be in sufficient funds to pay the same, as and when they became due, then he was to pay T. J. F. S. such money as he might then have in hand, and at once proceed to sell the trust property on hand at public or private sale, and apply the proceeds to the payment of such notes; and if there should be any surplus to apply it for the benefit of the persons thereinafter named. But if such notes should be paid at maturity out of the proceeds or profits of the business, or in any way otherwise than by a sale of the trust property as above directed, then the trust was to continue on the same terms and conditions as before stated for the benefit of the parties thereinafter mentioned, viz.: (1) To reimburse the R. & E. Manufacturing Co. its expenditures for the purchase of steel delivered to B. in the prosecution of the business of the trust. (2) To pay the R. & E. Manufacturing Co. a certain sum, with semi-annual interest, as represented by two notes of D., payable twenty-four months after date, they bearing even date with the declaration of trust. (3) To pay the R. & E. Manufacturing Co. all moneys due them by (him) B. on account of any matters connected with the trust, or for advances made by it in or about the business or property of the trust; and in case of default in the payment of such notes, or sums of money, obligations, or liabilities due or to grow due to the said R. & E. Manufacturing Co., or if said B. should not be possessed of sufficient funds to pay the same as and when they come due, then on trusts similar to those before limited, upon the non-payment or non-possession of sufficient funds to pay the notes of T. J. F. S. except as to the surplus, if any, which in this event is to go to D., and also except as to the disposition of the trust property in case these notes are unpaid otherwise than by a sale thereof, which in this event is to be transferred to D.

1. POWER TO ISSUE NEGOTIABLE, OR COMMERCIAL PAPER.
   (*a*) He has *no power* to issue such paper so as to render the *cestuis qui trust*, T. J. F. S. and R. & E. Manufacturing Co., liable thereon.
      1. There is no partnership between them, or between them or either of them, and D.; and B. is not their or either of their agents, either in the

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transaction of the business or for any other purpose.

1. There being no authority or power given by either T. J. F. S. or R. & E. Manufacturing Co., *the case of a note made B. does not fall within that line of decisions* where a principal who has given an agent authority to make notes is held liable on notes made by the agent in excess of his authority, and on those made within the authority, the proceeds whereof has misapplied to his own use.

2. POWER TO MAKE DEBTS OR BORROW MONEY.

(*a*) He has *no* such power, unless it may be for the purpose of conducting the business.

1. *It follows* that one to whom he has contracted a debt, or of whom he has borrowed money, *has no claim on the trust property*, either as a creditor or a *cestui qui trust;* unless, perhaps, he can show that the debt was contracted or money borrowed was for the purpose of, and was in fact used in, the carrying on of the business; in which case he could not assert his right in a common law action, but would have to go into equity for an accounting under the trust.

2. IT FURTHER FOLLOWS that a transferee of the trust property who takes for a full consideration by a transfer made by B. at the request and with the consent of D., T. J. F. S. and the R. & E. Manufacturing Co., *does not by so taking the property become liable* to pay such indebtedness or a note made therefor.

3. APPLICATION.

1. B. made a note dated June 23, 1874, payable to the order of himself, for $7,000. He signed it "Douglass Manufacturing Co., B., Treasurer." He borrowed $7,000 on the note. A portion of the $7,000 was applied towards the payment of one of the claims of T. J. S. F., mentioned in the declaration of trust; how the balance was applied does not appear. After this B., being unable to pay T. J. S. F., pursuant to the terms of the declaration of trust, transferred, at the request of D., T. J. S. F. and

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the R. & E. Manufacturing Co., the whole of the trust property to T. J. S. F. and the R. & E. Manufacturing Co., in consideration of the debts due them, to be held by them in proportion to their respective claims. Their claims far exceeded the value of the trust property.

HELD,

that the holders of the note had no claim either against T. J. S. F. and the R. & E. Manufacturing Co., or either of them, or against the trust property.

II. MAXIM.

1. *Secundum allegata et probata.*

(*a*) A judgment will not be sustained on an issue which is not pleaded.

III. AMENDMENT AT TRIAL.

1. One which substantially changes a claim or defense cannot be allowed.

(*a*) *Substantial change, what is.*

1. A change from an action on the case to one on express contract is

1. CASE AT BAR. The complaint sets forth a promissory note not purporting to be made by defendants, and various circumstances by reason of which it was sought to charge defendants with the payment of the note, but did not allege a promise by defendants or either of them to pay it. At the trial proof of an express promise was admitted, the judge stating that an amendment might be made if necessary. No amendment was in fact made. Verdict for plaintiff.

HELD,

1st. The verdict could not be sustained on the ground of an express promise, because it was not *secundum allegata.*

2d. The court at special term had no power to allow an amendment of the complaint by inserting an allegation of a promise to pay; consequently the General Term could neither deem it to have been made, nor make it itself, *so as to make the verdict secundum allegata.*

IV. PROMISE SUFFICIENT AND INSUFFICIENT TO SUSTAIN ACTION.

1. PRINCIPLE. Promise by A. to B. to pay money loaned to him

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by B. to C. to pay B.'s debt to C., is sufficient to enable C. to maintain an action against A.

(*a*) PRINCIPLE, NOT APPLICABLE TO CASE AT BAR.

1. To make it applicable there should have been a promise by Erwin and Flint to B., to pay a debt they owed, or a consideration moving from them, to B. to plaintiffs, for a debt owed by B. to them.

1. Nothing of this kind appears.

2. MERGER AND WANT OF CONSIDERATION.

(*a*) In the case at bar the promise was to D. and was either before or after the execution of an agreement between D. and the R. & E. Manufacturing Co., by which D. conveyed to the R. & E. Manufacturing Co. all his right, title, and interest in and to everything in the hands of B. as trustee, and called upon B. to execute conveyances of the property in his hands, and to transfer it to the R. & E. Manufacturing Co., and that company agreed to apply and appropriate the property to them so conveyed towards the accrued indebtedness of D. and the Douglass Manufacturing Co. to them, and to the indemnification of themselves for any liabilities under which they were on account of D. or the Douglass Manufacturing Co., and for any damages, &c., and that after so paying and indemnifying themselves, they would pay to D. any surplus or balance of said property that should remain.

HELD,

that a promise to pay any claims not included in the instrument was

1st. If made before the execution of the instrument, *merged in it.*

2. If made afterwards *without consideration*, there being no consideration for the possession, other than the transfer made by the agreement.

Before SEDGWICK, Ch. J., SPEIR and RUSSELL, JJ.

Decided December 6, 1880.

Appeal from a judgment entered upon the verdict of a jury.

The complaint was as follows:

"1. That the plaintiffs are, and that at all the times mentioned herein, they were, partners doing business

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in the city of New York, under the firm name of Storr Brothers.

"2. That as such partners, they own and hold a note, of which the following is a copy:

"'NEW YORK, June 23, 1874.

"'One month after date, we promise to pay to the order of R. P. Bruff, Esq., $7,000, at Importers' and Traders' National Bank; value received.

"'DOUGLASS MANUFACTURING COMPANY.

"'Rich. P. Bruff, Treas.'

"3. That 'Douglass Manufacturing Company' was the name by which a certain manufacturing business was carried on in the city of New York and elsewhere, at the time the said note was made; that these plaintiffs do not know the names of all the persons who participated in carrying on the said business, but that, as they are informed and believe, the defendant, Thompson J. S. Flint, and the defendant, the Russell & Erwin Manufacturing Company, which then was and now is a duly organized corporate company, so participated, and that they were some or all the parties doing business under such name; that by the arrangement under which such business was carried on by the defendants, the said Richard P. Bruff was authorized to make the said note.

"4. That the said note was given for value received by the said business from these plaintiffs, and that, in consideration of such value, the said note was made, and by the said Richard P. Bruff was indorsed to these plaintiffs.

"5. That the title to all the assets of the said business was vested in the said Richard P. Bruff, and was held by him under a certain written instrument or declaration, duly executed by him, bearing date January 30, 1873, whereby he was created trustee to

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carry on the said business, for, and for the benefit, among others, of the defendants. That both by the terms of the said instrument, as these plaintiffs are informed and believe, and in the nature of the case, all the assets so held by the said Richard P. Bruff, as such trustee, for the benefit of the said business, were bound and became liable for the payment of its debts, including the amount so due these plaintiffs; and that, after the said note was received by these plaintiffs, the defendants compelled the said Richard P. Bruff, as such trustee, to, and he did transfer such assets to them. That the defendants gave no consideration for such transfer, and that the value of the assets so transferred to them largely exceeded all the indebtedness of such business, whereby, as these plaintiffs are informed and believe, the defendants became liable to pay such indebtedness, including the amount so due the plaintiffs.

"The plaintiffs, therefore, ask judgment against the defendants for the sum of $7,000, with interest thereon from July 26, 1874, and the costs of this action."

The defendants, answering separately, denied that Bruff had any authority from them to make the note in question, or that they were, as parties to the note, or as partners or joint stock owners, or in any way, bound to pay it. They disputed the construction put by the plaintiffs in their complaint, on the deed of trust to Bruff, and disputed that the assets of the Douglass Manufacturing Company were to be held by him for the payment of general debts, and alleged that he was to hold them for the payment of certain specified debts, among them, the defendants'. They alleged that Bruff's transfer to them was voluntary, after friendly negotiations, in accordance with the terms of the deed of trust to Bruff; because of the happening of certain contingencies and defaults provided for in

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the deed; and that it was upon a consideration exceeding the value of the assets so transferred.

The case was tried in June, 1880. On the trial the following facts were developed. The "Douglass Manufacturing Company" was not a corporation, a joint stock company, or a copartnership. It was a name adopted by Thomas Douglass under which to do business. For most practical purposes, so far as this case is concerned, Thomas Douglass and the Douglass Manufacturing Company were one and the same. Under this name—"The Douglass Manufacturing Company"—was conducted the business of two manufactories, one at Seymour, in Connecticut, called the "F. L. Ames Auger Works," and one at Arlington, Vermont, called the "F. L. Ames Chisel Works," which manufactured and sold hardware of the nature of chisels, augers, &c. At the time of these transactions, and for some years previous, the Russell and Erwin Manufacturing Company sold in New York, upon commission, as factors, the goods manufactured by these mills. The title to the property at Seymour, Connecticut, and Arlington, Vermont, seems to have been in Fred. L. Ames, Oakes Ames and Oliver Ames. Thomas Douglass owned an equitable interest in the property, as did N. R. Douglass and Charles Douglass, the extent of which nowhere appears. The title to the personal property was in F. L. Ames. Just how the Ameses came to hold the title does not appear, nor is it important, but the surrounding circumstances seem to indicate that they held it as security for advances or debts. Thomas Douglass had charge of the business, apparently as the owner. He became embarrassed financially. The mills were running behind. He sought to borrow money. He was made acquainted with the defendant, Flint, through Mr. Stillman, a lawyer. They entered into negotiations, the result of which was a loan of $136,063.97 by Flint, and a loan of $61,290.18, and an

agreement to advance and supply steel for manufacture, by Bruff, representing the Russell & Erwin Manufacturing Company. A portion of the moneys loaned by the defendants was paid to the Ameses, to satisfy some claim they had upon the property. It would seem also that they still had a mortgage or mortgages after such payment. Thereupon, about January 18, 1873, the Ameses executed to Bruff deeds conveying the property at Seymour, Connecticut, and Arlington, Vermont, and a bill of sale to Thomas Douglass, covering all the personal property, the product of such mills. This personal property Douglass at once turned over to Bruff. N. R. Douglass and Charles Douglass quit-claimed whatever interest they had. Bruff at the same time executed a declaration of trust, reciting the conveyances to him, and that the money with which to pay the Ameses was supplied by Flint and the Russell & Erwin Manufacturing Company, upon his agreement and undertaking to hold and manage the property and the business of the said Douglass Manufacturing Company, therewith connected, for the interests, security, benefits and payments as thereinafter declared. The recital of the objects of the trust is as follows:

"Now, therefore, know ye that I, the said Richard P. Bruff, do make known, admit, and declare that said premises and property and the business therewith connected, were so conveyed and transferred, sold and delivered to me, and are held and to be held, managed and disposed of by me for the uses and benefits of the parties hereinafter named, and upon the trusts hereinafter specified, to wit:

"First. To pay the expenses of the business.

"Second. To pay to Barney, Butler & Parsons the following sums of money: [As it is conceded this amount was paid, it need not be recited.]

"Third. To pay Thompson J. S. Flint as follows: $61,290.08 and interest thereon, semi-annually, at the

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rate of seven per cent. per annum from the date hereof, as represented by a note of Thomas Douglass to said Flint, bearing even date herewith, payable twelve months from date, interest payable semi-annually.

"Fourth. To pay Thompson J. S. Flint the sum of $13,483.81, as represented by a note of Thomas Douglass to said Flint, bearing even date herewith, payable twelve months from date.

"Fifth. To pay Thompson J. S. Flint $61,290.08 with interest thereon semi-annually, in twelve months from date, as represented by two notes of Thomas Douglass to said Flint, bearing even date herewith, each for the sum of $30,645.04, payable twelve months from date, with interest thereon, semi-annually.

"In case default shall be made in the payment of any of the said notes or sums of money to said Thompson J. S. Flint, or in case I shall not be in possession of sums sufficient to pay the same as and when they shall become due, I will pay over to the said Thompson J. S. Flint, his heirs, executors, administrators or assigns, such amount of money as I may have on hand, and at once proceed to sell the property on hand, both real and personal, at private sale or at auction, and to realize therefrom the largest amount possible, and shall apply the proceeds of the sale of said property in payment of said debts, notes and obligations due Thompson J. S. Flint, and if any balance shall thereafter remain, I will apply the same as hereinafter provided; but if said notes, obligations and liabilities due to said Flint, shall be paid at maturity out of the proceeds or profits of the business, or otherwise than by sale of the property hereinbefore mentioned, then I hereby promise and agree to continue the trust upon the same terms and conditions as hereinbefore stated, for the benefit of the parties hereinafter mentioned.

"First. To reimburse the Russell and Erwin Manufacturing Company all sums of money expended by

them for the purchase of steel, delivered by them to me in the prosecution of the business of this trust herein specified.

"Second. To pay the Russell & Erwin Manufacturing Company $61,290.08 twenty-four months from the date hereof, with interest thereon, at the rate of seven per cent. per annum, payable semi-annually, as represented by two notes of Thomas Douglass, bearing even date herewith, payable twenty-four months from date, with interest thereon, semi-annually, each of said notes being for the sum of $30,645.04.

"Third. To pay to the said Russell & Erwin Manufacturing Company any other sum or sums of money which may be due to them from me on account of any matter or thing connected with this trust, or for any advances made by said company in or about the business or property of this trust.

"In case default shall be made in the payment of any of said notes or sums of money, obligations or liabilities, due or to grow due to the said Russell & Erwin Manufacturing Company, or in case I shall not be in possession of funds sufficient to pay the same as and when they become due, I will pay over to the parties entitled thereto such amount of money as I may then have on hand, and will at once proceed to sell the property on hand, both real and personal, at private sale or at auction, and will realize therefrom the largest amount possible, and will apply the proceeds in payment of said debts, liabilities, notes and demands due to the Russell & Erwin Manufacturing Company, in the order above set forth, and if any balance shall remain, it shall be paid over to Thomas Douglass; and I will, after the payment of the foregoing sums of money secured to be paid by this declaration, forthwith convey and deliver all and whatever property, right, thing or interest before described or hereafter to be acquired by me in the prosecution of this trust, shall remain, in

due and proper form to Thomas Douglass, of the city of Brooklyn, his heirs, executors, administrators or assigns."

Bruff was the agent and general manager of the business of the Russell & Erwin Manufacturing Company, in the city of New York. He received the conveyances, and executed the declaration of trust above referred to, and made the advances recited without the authority, consent, or knowledge of the company. The officers of the company did not learn of it until about April, 1874. On account of this and other matters, Bruff was discharged from their employment. The business of the Douglass Manufacturing Company under the trust was not prosperous. The $13,483.81 recited in the fourth subdivision of the declaration of trust, was paid, but chiefly, it would seem, with borrowed money, a part of which was the money obtained upon the $7,000 note upon which this suit is brought. The sums provided for in the third and fifth subdivisions of the declaration of trust as to Flint, were not paid in accordance with the terms of the declaration, nor did Bruff have on hand the moneys with which to pay when they became due, January, 1874, nor were the Russell & Erwin Company paid their advances, made from time to time for the purchase of steel and other supplies. On May 20, 1874, after much negotiation, Thomas Douglass executed to the Russell & Erwin Manufacturing Company a deed, reciting the conveyances to Bruff, and his declaration of trust, discharging Bruff from obligation to him, and directing him to convey the property to the Russell & Erwin Manufacturing Company. And the Russell & Erwin Manufacturing Company on their part agreed and covenanted to apply and appropriate all the interest which came to them by virtue of that conveyance, to the payment of the indebtedness of Douglass and of the Douglass Manufacturing Company then existing, or

which might thereafter arise, *to themselves* and towards their indemnification for liabilities on account of Douglass, or of the Douglass Manufacturing Company, and after such payment for all such matters, to pay over any surplus to Douglass. On July 23, 1874, the Russell & Erwin Manufacturing Company, by Erwin, the president, Thompson J. S. Flint, and Thomas Douglass, united in a letter to Bruff, in which, after reciting the conveyances and the declaration of trust, and asserting that they were all the parties having an interest in the property held in trust, they authorized and required him to convey and transfer all the property held by him to Thompson J. S. Flint, and to the Russell & Erwin Manufacturing Company, "for the consideration of the debts due to the said Flint and to the said Russell & Erwin Manufacturing Company, to be held by them in proportion to their respective claims." At that time, the indebtedness to Flint amounted to about $113,000, and the indebtedness to the Russell & Erwin Manufacturing Company amounted to about $147,000. On July 24, Bruff conveyed the property to Flint and to the Russell and Erwin Manufacturing Company. On the same day, articles of association of the Douglass Manufacturing Company, as a body corporate, under the laws of Connecticut, with a capital stock of $280,000, were filed. To this company, so formed, Flint and the Russell & Erwin Manufacturing Company conveyed the property in question, the consideration named being $280,000, and being, in fact, the capital stock of the new company, which was distributed *pro rata* according to their interest. The Douglass Manufacturing Company, so incorporated, did business but a short time, unsuccessfully, when the mills at Seymour and at Arlington were sold, the former bringing $16,000 and the latter $5,000. A copy of the note on which this suit was brought, appears in the complaint, *supra*.

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According to the testimony of Thomas Douglass, called by the plaintiff, at least $4,916 of the $7,000 note was applied to the payment of the note of $13,483.81 to Flint, recited in the declaration of trust, which fell due January 16, 1874. As the $7,000 note was given in renewal of other notes, the precise application of the proceeds of which does not appear, it is not clear whether, of the moneys borrowed upon the $7,000 note and the notes in renewal of which it was in part given, any greater sum than that stated above went towards the payment of the $13,483.81 note to Flint. Douglass testified generally that the money went "into the business" of the Douglass Manufacturing Company, but whether to pay the antecedent debts or to carry on the ordinary business of the company under the Bruff trust, does not appear, except as to the $4,916. Douglass testified that when the project of the formation of the new company was first mentioned, it was said that all of the property of the Douglass Manufacturing Company's business was to be turned over to the new company, and that then Erwin said the business was to be prosecuted without any change or interruption, a complete inventory taken, and an entire account of the indebtedness, which was to be paid without discredit to the Douglass Manufacturing Company. He also testified that Stillman, who was the attorney who procured the loan and made out the trust papers and conveyances, confirmed Erwin in what he said. It nowhere appears in the evidence that Flint himself said anything like this. Erwin positively denies that *he* did. On the trial there was read the testimony of Mr. Erwin in the suit of Gautier against these defendants, in which he had testified, it seems, that he did say "that he would consider and undertake to adjust anything that was a legal lien upon the property of the Douglass Manufacturing Company, incorporated; in other words, that which appeared they were legally

bound to pay." At the close of the plaintiff's testimony, the defendants moved for a nonsuit, on the ground that the facts proved did not impose upon them a liability to pay the note in question. The learned judge who presided on the trial, denied the motion, not only overruling the objections stated, but adding that the testimony of Douglass showed an express promise on the part of the defendants to pay, which the plaintiffs could avail themselves of under the decision in Lawrence *v.* Fox, and that the plaintiffs might amend their complaint, if so advised, alleging this express promise. There was a general exception to this decision. The judge finally submitted the case to the jury solely upon the question whether the defendants, upon a sufficient consideration, agreed to pay the plaintiffs' claim against the Douglass Manufacturing Company as an inducement for the final transfer to them of the assets in Bruff's hands.

W. F. Shepard, and *Luther R. Marsh*, for the appellants.

Owen & Gray, and *John E. Parsons*, for the respondents.

BY THE COURT.—HORACE RUSSELL, J.—[After stating the facts as above.]

I am of opinion that this judgment cannot be sustained.

While the complaint might have been good on demurrer, it is somewhat indefinite and uncertain, and the proof fails to sustain it in the following particulars: (1) The complaint substantially alleges that the defendants so "participated" in the business conducted by Bruff under the declaration of trust, as to be liable as partners. They did not participate. They had no share in the profits. They were simply *cestuis que*

trust, with no actual participation in the conduct of the business, and with no right, or claim of right, except to have their loans, with interest, paid out of the proceeds of the business. (2) The declaration of trust by Bruff did not agree to pay the debts of the Douglass Manufacturing Company as alleged, but only the expenses of the trust business and the specific debts of the defendants. (3) Bruff was not "compelled" (as alleged) certainly not by any duress to transfer to the defendants the assets of the Douglass Manufacturing Company in his hands as trustee, but made such transfer in consequence of negotiations, when it became apparent that he could not pay from the funds in his hands the note to the defendant Flint then due, or pay to the Russell and Erwin Manufacturing Company the moneys which, without their authority, he had advanced to the Douglass Manufacturing Company. (4) The complaint alleges that the defendants gave no consideration for the transfer to them. The indebtedness of the trust to them was the expressed, and a sufficient consideration. (5) The assets did not exceed the just claims of the defendants (as alleged), but were less. It must be remembered that there were prior mortgages upon the property.

I. The theory of the plaintiffs, as indicated by their complaint, and the argument of counsel on the appeal, was that they could sustain their cause of action on either of two grounds; the first being that the defendants were so far partners and Bruff so far their agent in the making of the note sued upon, that they could be held upon it directly. The judge at the trial refused to permit that theory to go to the jury. They were not partners. In no aspect of the law of partnership could they be regarded as partners. Their only relation to the business of the Douglass Manufacturing Company was as *cestuis que trust* for loans and advances. (Cox *v.* Hickman, 8 *H. of L. Cases*, 301).

The second theory, and that on which counsel seem chiefly to rely, was that inasmuch as the defendants had received from Bruff, the trustee, the assets in his hands as trustee, they were bound to pay the debts of the Douglass Manufacturing Company. In support of this theory was quoted the proposition: "It is a universal rule that if a man purchases property of a trustee with notice of the trust, he shall be charged with the same trust in respect to the property as the trustee from whom he purchased" (*Perry on Trusts*, § 217). "And even if he pays a valuable consideration with notice of the equitable rights of a third person, he shall hold the property subject to the equitable interests of such person (*Id.* 828). "If the trustees convey the estate by a breach of trust, the *cestui que trusts* may follow the estate into the hands of a volunteer, whether he had notice of the trust or not, and into the hands of a purchaser for value if he have notice of the trust. The purchaser under such circumstances becomes a trustee and liable in the same manner as the person from whom he purchased, for knowing another's right to the property, he throws away his money."

Many cases were cited in support of these propositions, which must be regarded as fundamental in the law of equity. Undoubtedly any person who purchased from the trustee in this case the property of the trust, with a knowledge of the trust, would have taken it subject to the trusts. But what application can these doctrines have to a case where the trustee with the consent of the creator of the trust and owner of whatever equitable interest there was after the trust, conveys to the *cestui que trust* themselves? All the parties to the trust instrument are parties to this transaction and bound by it. It cannot, therefore, be regarded as a wrongful disposition of the trust property by the trustee. There is nothing in the doctrines above quoted which would hold the purchaser of a trust es-

tate from a trustee, responsible for the general debts of the creator of the trust, unless the holders of such debts were included among the *cestuis que trust*. The general creditors of the Douglass Manufacturing Company were not included in Bruff's declaration of trust, so that we may go to the full length of the proposition of law quoted, without their having any claim either in law or in equity against even a general grantee of the trustee. These defendants stand in a much better position, as I have indicated, than an ordinary grantee, by reason of their having been the only *cestuis que trust* named in the deed of trust. The persons who might pursue the trust property in the hands of grantees are themselves the grantees. The transactions proved, therefore, aside from the alleged express promise, imposed upon the defendants no legal obligation to pay the note in question or any other of the outside indebtedness of Thomas Douglass. They had advanced money and property to Douglass for which they were secured by the trust deed. The conditions on which the trust was to terminate had happened. Bruff had not the money to make the stipulated payments to them. The property must either be sacrificed at an auction or enforced private sale, or conveyed in the way it was. There can be little doubt that it was inadequate to pay the prior liens and the debts due these defendants. The defendants, therefore, had a right, Thomas Douglass consenting, to receive from Bruff a conveyance of the property in consideration of their loans and advances. It would be a strange theory of law which could make the defendants, by reason of taking such a conveyance in payment of their own prior liens, responsible for all the floating debts of Thomas Douglass, however incurred, or even those incurred by him in connection with this particular business. The only trust with which, according to the strictest of the authorities, the defendants took

that property, was the obligation to pay the expenses incurred by Bruff as trustee. It was Bruff's first duty to pay the expenses out of the property coming into his hands. Whether or not he did so, we have no proof in this case. There is, however, proof that the money received from the plaintiffs was not devoted to the payment of expenses, but, so far as it is traced, was devoted to the payment of a prior indebtedness—to wit: one of the notes held by Flint. Therefore, in no sense, can it be claimed that the debt due the plaintiffs constituted them *cestuis que trust* of the trust estate, so that they have a right to claim that the defendants held the property constructively as trustees for their benefit. And if they had such a right, they could not assert it in a common law action like this, but must go into a court of equity in an action for an accounting under the trust. It may be that as general creditors they would have a right to set aside a transfer to the defendants by proving it fraudulent as against creditors, but even proof that the transfer was fraudulent against creditors, would not give them a common law action on the case to recover the amount of their debt from the grantees.

It was urged on the argument that the note sued upon, being signed in the form ordinarily used in issuing commercial paper for the purpose of the business of the Douglass Manufacturing Company, constituted a claim against the business done by that company under the trust. The commercial character of the paper can be relied on only as against the parties to it. Bruff signed the note as treasurer of the Douglass Manufacturing Company. He was not in fact the treasurer of any such company, and it cannot be pretended that either of the defendants gave him authority to sign this paper as such treasurer, or in any other way. He was not their agent in making that paper. Thomas Douglass, who participated in the transaction, whether

called "Thomas Douglass" or the "Douglass Manufacturing Company," would undoubtedly be bound by Bruff's signature, not because Bruff, by reason of the trust, had any power to make such paper, but because Thomas Douglass, from his relation to the transaction, would be estopped from denying that Bruff was his agent in making the paper. That estoppel does not extend to the defendants. Bruff's position as trustee certainly gave him no express authority to make paper or borrow money. If he had such authority, it must be implied from the nature of the business. His duty was confined to the application of moneys which came into his hands from the sale of goods, to the payment, first, of the expenses of the business, and then to the payment to the indebtedness to Flint, and then to the payment of the indebtedness to the Russell & Erwin Manufacturing Company. The making of notes at all by Bruff, and clearly the making of notes on which to borrow money to pay Douglass's debts, was entirely outside of any authority conferred upon him by the trust. It cannot justly be claimed that by reason of anything which these defendants did, the plaintiffs took the note in question, and thereby these defendants became bound to pay it; and so that class of cases cited by the plaintiff's counsel on the argument (The Exchange Bank *v.* Monteith, 17 *Barb.* 171; North River Bank *v.* Aymar, 3 *Hill*, 262; Engh *v.* Greenebaum, 2 *Hun*, 136; Bank of New York *v.* Bank of Ohio, 29 *N. Y.* 619; Case *v.* Mechanics' Banking Association, 4 *N. Y.* 166), in all of which a principal sought to escape liability upon his notes in the hands of innocent holders, because an agent, either authorized to make notes for the principal, or supplied with notes made by the principal himself, had either made more notes than he, the agent, was authorized to make, or had misapplied funds to his own use—do not apply to a case like this under consideration. They all pro-

ceeded upon the theory that where one of two innocent persons must suffer, it should be that one who placed it in the power of some third person to do the wrong which caused the injury. Neither Flint nor the Russell & Erwin Manufacturing Company put it in the power of Bruff to issue notes of the Douglass Manufacturing Company, as treasurer or as trustee, or in any other way, and therefore the principle which runs through all the cases cited above, has no application to them. It might be applicable as against Thomas Douglass. The right of the plaintiffs to recover as against these defendants, depends, then, not on the commercial character of the paper on which they made their loan, but on the application of the moneys received by Douglass and by Bruff. So far as those moneys are traced at all, they went, not to pay the expenses of the business of the Douglass Manufacturing Company, under the trust, but to pay a part of an antecedent debt, to wit: the note to Flint. The debts of the Douglass Manufacturing Company are by no means necessarily the debts of the trust estate. The trust did not authorize Bruff to make debts. And when Bruff issued notes as an agent, the plaintiffs were bound to make inquiry as to the extent of his authority (North River Bank *v.* Aymar, *supra*). It will be observed that the note here sued on, is not signed by Richard P. Bruff, trustee, but by Richard P. Bruff as treasurer. So far, then, as appears from the face of the paper, it would seem that in making it Bruff was not acting as trustee, but in some other capacity, with some other authority, and under a title either assumed by himself or conferred upon him by Thomas Douglass. This case differs very essentially from that of Gautier against these same defendants, to which we are cited in the 13 *Hun*, 514. Gautier had furnished to the trustee steel which was manufactured into augers, &c., and sold for the benefit of the trust estate. Without expressing concurrence with what

seems to have been assumed by the learned judge who wrote the opinion in that case—that the debt of the plaintiffs was one which could be included under the head of "expenses of the business," and therefore one subject to which the defendants received the conveyance of the trust property—the distinction between that transaction and this—where the plaintiffs made a loan of money which went, according to the evidence, to Thomas Douglass, was deposited in his own bank, and a portion of which (at least) he used, not in the expenses of the trust business but to pay his debt—is quite obvious.

2. Now comes the question whether this judgment can be sustained on the ground that the defendants expressly promised to pay the debt of the plaintiffs or the debts of the class to which it belonged. The objections to that are:

First. The plaintiffs in their complaint do not count on any express promise. The old doctrine that the judgment recovered must be *secundum allegata et probata*, has not been done away with by the Code, but still remains, and a judgment will not be sustained upon an issue which is not pleaded and litigated (Wright *v.* Delafield, 25 *N. Y.* 266; Kniffen *v.* McConnell, 30 *Id.* 285).

The plaintiffs made no motion to amend their complaint, but the judge at the trial, in denying a motion for a nonsuit made at the close of the plaintiff's testimony, in part because of such proof as there then was of an express promise, said: "This promise, under the doctrine of Lawrence *v.* Fox, inured to the benefit of the plaintiffs so as to enable them to maintain an action upon it, and, if necessary, their complaint can be amended so as to embrace the express promise." Nothing more occurred on this subject. The plaintiff's counsel said nothing indicating an acceptance of the permission of the court. The complaint was not in fact amended. It stands now precisely as it originally

stood. The quotation above recites everything which the appeal book contains on that subject, except that the only question submitted to the jury was whether or not there was an express promise. All the testimony with reference to an express promise, the ruling of the judge above quoted, and his submission of the question to the jury, were against the defendant's objection and exception. If the amendment was one which the judge at the trial had authority to make, it may be made by this court *nunc pro tunc* (Reeder *v.* Sayre, 70 *N. Y.* 190); but, as it seems to me, it was not such an amendment as he was authorized to make. The power of a judge on a trial to amend is confined to matters which do not substantially change a claim or a defense (*Code*, § 723). His power is very different from that of a judge sitting at special term. The latter may permit almost any amendment, upon terms; but it is error for a judge at a trial to permit an amendment which substantially changes a claim or a defense. If he thinks the interest of justice demands such a change, he should stop the trial and give the party an opportunity to apply at special term for leave to amend upon terms. Here was an action on the case—that is, arising out of special circumstances. The amendment would have changed it to an action on express contract—certainly a substantial change, and one which comes within the inhibition of section 723 (Van Sycles *v.* Perry, 3 *Robt.* 621; Ford *v.* Ford, 53 *Barb.* 525; Smith *v.* Rathburn, 13 *Hun*, 47, 53; Union Bank *v.* Mott, 19 *How. Pr.* 267; Phillips *v.* Melville, 17 *Hun*, 211: Joslyn *v.* Joslyn, 9 *Id.* 388; Sinclair *v.* Neil, 1 *Id.* 80).

As the amendment was one which the judge at the trial had no authority to make, it cannot be made now, and we must consider the case on the complaint as originally drawn. Under that, the evidence as to an express promise was not *secundum allegata*, and

should not have been received, nor should a recovery have been permitted on such a ground.

Second. Aside from the question of pleading, can this judgment be sustained on the ground that the defendants promised to pay the debt upon which the judgment was recovered? I think not. The doctrine of Lawrence *v.* Fox (20 *N. Y.* 268), that where A loans money to B upon B's promise to pay A's debt to C, C may maintain an action on the promise against B, will not be questioned. It need not be. But it may be said that that decision was by a divided court—COMSTOCK and GROVER, JJ., dissenting—and that the court of appeals have ever since indicated a disposition not to extend the rule there adopted (Simson *v.* Brown, 68 *N. Y.* 355; Vrooman *v.* Turner, 69 *Id.* 280, Opin. by ALLEN, J.). It introduced an anomaly, contrary to all previous notions of privity of contract, and in England the doctrine, which once got a foothold on certain *dicta*, has since been entirely overthrown. It is, however, the settled law of this State. The question here is about its application to the facts of this case. The first objection to its application is that the defendants made no promise whatever to Bruff, the person who made the transfer (from whom, if any one, the consideration moved). And it is not proved that what they are alleged to have said to Douglass, was ever communicated to Bruff as the consideration or inducement of the transfer by him. To say that Erwin's and Flint's promise to Douglass to pay Douglass's debts, not made to Bruff or communicated to Bruff, was the inducement for Bruff to convey, which will support an action by Douglass' creditors against Erwin and Flint, is obviously an extension of the doctrine laid down in Lawrence *v.* Fox which it will not bear (Vrooman *v.* Turner, *supra*).

A most liberal construction of the doctrines of that case could not establish a privity of contract between the plaintiffs and defendants here. The consideration,

even admitting there was any, was too remote. The next objection is that the agreement between Douglass and the Russell & Erwin Manufacturing Company as to what each should do, was in writing. I refer to the deed of indenture, dated and executed May 20, 1874, and exhibited to Bruff on that day. (Exhibit K.) That deed, after reciting the conveyance to Bruff of the property at Seymour and Arlington, Bruff's declaration of trust, the indebtedness of Douglass in his own name, and in the name of the Douglass Manufacturing Company, to the Russell & Erwin Company, in consideration of the premises conveys to the Russell & Erwin company all Douglass' right, title and interest to the premises, property and proceeds, and in any trust fund in the hands of Bruff—in short, everything in the hands of Bruff as trustee in any way connected with the Douglass Manufacturing Company, and calls upon Bruff to execute conveyances of the property in his hands and to transfer it to the Russell & Erwin Company. The Russell & Erwin Company on their part agreed that they would apply and appropriate the property to them so conveyed, toward the accrued indebtedness of Douglass and the Douglass Manufacturing Company to them, and to the payment and indemnification of themselves for any liabilities under which they were, on account of Douglass or the Douglass Manufacturing Company, and for costs, damages, &c., and that, after so paying and idemnifying themselves, they would pay to Douglass any surplus or balance of said property that should remain, &c. This deed is signed by all these parties, was executed and was recorded. Certainly all prior negotiations were merged in it. It is a general rule of evidence and of contracts, as well settled as it is salutary, that a written contract executed between parties, supersedes all their prior negotiations and agreements on the same subject. This is especially true where the final contract is an executed one, and those which pre-

ceded it were merely executory, and *more* especially where what preceded were merely oral discussions and negotiations. This deed says nothing about the payment by the Russell & Erwin Manufacturing Company of the debts of the Douglass Manufacturing Company. Any subsequent negotiations, unless moving upon some new consideration, were void. After this deed was executed, Douglass had nothing to convey, as the consideration for any new agreement. At any rate, there is no proof that he did convey or give anything. What consideration was there, then, to support any promise by the Russell & Erwin Company to Douglass, made in July, to pay the debts of the Douglass Manufacturing Company? Without consideration, any promise they made to pay the debt of the Douglass Manufacturing Company, was void under the statute of frauds (Belknap *v.* Bender, 75 *N. Y.* 446; Simson *v.* Brown, *supra*).

It comes to this: We are asked to hold the defendants liable for a debt of Douglass to the plaintiffs, because of an alleged promise by the defendants to Douglass without consideration, or because Bruff conveyed to the defendants, without any promise being made to him, the property to which, as *cestuis que trust* and owners of the equity, they were already entitled. On May 20, 1874, the defendants became the legal owners of whatever equity Douglass had in the property. They were already the *cestuis que trust*. Briefly stated, then, whatever negotiations occurred between the Russell & Erwin Manufacturing Company and Douglass, were merged in the deed of May 20, 1874. At any rate, parol proof must not be permitted to vary the obligations taken upon themselves by the parties to that instrument. Whatever negotiations occurred after that deed was executed, between Erwin and Douglass, were without consideration; and the performance of an obvious duty by Bruff without any knowledge of the

alleged promise from the Russell & Erwin Manufacturing Company to Douglass, cannot be regarded as a consideration and inducement to support a promise from the Russell & Erwin Manufacturing Company to Douglass, to pay Douglass' debts (See Belknap *v.* Bender, *supra*).

Third. What was said in this case, viewed in the aspect most favorable to the plaintiffs, did not amount to a promise that *the defendants, out of their own moneys*, would pay the plaintiffs' claim. The testimony of the promise relied on is as follows:

"Q. In any of these talks was anything said, and if so, what, as to what should be done with this indebtedness if all the property were transferred?

"A. Erwin said the business was to be prosecuted without change or interruption, a complete inventory taken, an entire account of the indebtedness which was to be paid without discredit to the Douglass Manufacturing Company. Mr. Stillman had a list of the liabilities, and confirmed what Erwin said to me—that all this indebtedness should be paid. This was before the property was completely turned over to the Russell & Erwin Manufacturing Company and Mr. Flint. The indebtedness, outside of the Russell & Erwin Manufacturing Company and Mr. Flint, amounted, I think, to $114,000. There was due the Russell & Erwin Manufacturing Company $109,000, to Flint $91,000, to Ames $61,290.08. The entire amount was $391,000, viz.: due Flint $91,835.12, Mr. Ames $61.290.08. The Russell & Erwin Manufacturing Company $124,053.50. All others $114,000. The consideration of the deed from Flint and the Russell & Erwin Manufacturing Company to the Douglass Manufacturing Company, was the stock of the company."

According to other testimony of Douglass, it occurred "within forty-eight hours" of the time when the Douglass Manufacturing Company, incorporated, was

formed. That company was formed July 24, 1874. The conversation occurred at Seymour at the time when Mr. Stillman went there to make some examination as to how he could secure Mr. Flint, and Mr. Erwin was there for the purpose of securing the payment of the money due the Russell & Erwin Manufacturing Company. It must constantly be borne in mind that the Russell & Erwin Manufacturing Company at that time had a conveyance of all Douglass' interest, executed the 20th of May previous. Stillman suggested the formation of a new company, and the testimony, fairly construed, indicates that they were discussing what should be done in the event of the formation of such a company. Is it, then, a fair construction of the testimony of Douglass, above quoted, to say that Mr. Erwin meant to engage that *the Russell & Erwin Manufacturing Company would, out of their own moneys*, pay the entire floating indebtedness of the Douglass Manufacturing Company, viz., $114,000? Or that Mr. Stillman, who was there for no such purpose, by "confirming what Mr. Erwin said," meant to engage that Thompson J. S. Flint would, out of his own money, pay the debts of the Douglass Manufacturing Company? I think not. The testimony in the case all clearly shows that Thompson J. S. Flint was not present at any of these interviews, and that he personally made no promise whatever of this character. The claim against him in this action, rests upon what was said by Stillman, above quoted. There is no testimony in the case from which the inference can be fairly drawn that Mr. Stillman was so far his attorney in fact, as that his suggestion "confirming Erwin," could bind Mr. Flint *to pay out of his own pocket* the antecedent debt of another to the extent of $114,000. Without reciting the other testimony in relation to this subject, it seems to me a perversion of language to claim that these defendants engaged to pay with their

own money the debts of the Douglass Manufacturing Company. At the very best, it was not an absolute and positive promise to pay to the plaintiffs, but a promise to Thomas Douglass to protect the Douglass Manufacturing Company. That was not enough to bring the promise within the rule laid down in Lawrence v. Fox (Garnsey v. Rogers, 47 *N. Y.* 233; Simson v. Brown, *supra*; Johnson v. Morgan, 68 *N. Y.* 494).

Fourth. The defendants, Woodruff, Erwin, the Flints, all deny that they made the promise testified to by Douglass; so that the weight of evidence is, in my judgment, against the plaintiff's claim. Certainly so when the fair interpretation of Douglass' testimony standing alone does not clearly show that they meant to contract to pay the plaintiff's claim.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

SEDGWICK, Ch. J., and SPEIR, J. concurred.

HENRY HOFFMAN, AN INFANT, &C., RESPONDENT, *v.* THE NEW YORK CENTRAL, &C., R. R. CO., APPELLANT.

Master and servant—liability of railroad company for wrongful act of servant.—Judge's charge as to credibility.—Evidence—police and hospital records of accidents.

Whether the wrongful act of the servant of a railroad company not inconsistent with the nature of his employment, was done in pursuance of his employment and in the interest of his employers, or wickedly and maliciously out of his own spite, is always a question for the jury; and when the jury find such act to have been done in pursuance of the servant's employment and to serve the interests of the employer, the employer is liable.

The above principles applied to a state of facts, showing that plaintiff, a lad eight years of age, being a trespasser on one of the de-

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fendants' trains, then moving at the rate of ten miles an hour, was kicked therefrom by one of the defendants' servants, thereby suffering severe injuries: the court holding that there was no distinction in the authorities between the commission of such an act by the conductor and by other servants of the company.

A chance expression of opinion as to the credibility of a material witness, made by the judge in his charge, and which he subsequently qualified by a statement to the effect that the jury are not bound thereby, does not necessarily furnish good ground for exception.

Records kept at the police station and hospital, showing injuries received by plaintiff from an accident, are not admissible in evidence against him in an action for such injuries, it not appearing that the entries therein were made by persons having knowledge of the facts or from statements of the plaintiff.

Before SPEIR and RUSSELL, JJ.

Decided December 6, 1880.

Appeal from a judgment entered upon the verdict of a jury.

The action was for damages for personal injuries occasioned to the plaintiff by being kicked off the defendant's cars by the defendant's servant. It has been three times tried. On the first trial, in April, 1877, the complaint was dismissed. (See 12 *J. & S.* 1.) On the second trial, in June, 1878, the jury disagreed. On the last trial, the jury rendered a verdict for the plaintiff for $5,000. From the judgment entered thereon this appeal is taken.

The facts were as follows: On January 21, 1869, the plaintiff, then a lad about eight years old, living with his parents, started to go to school in Forty-fourth street. As he was going up Eleventh avenue, a train of the defendants' came along, and he jumped on the front step of the third or fourth car from the engine. When about fifteen feet above the northerly cross-walk of Fortieth street, the plaintiff was kicked off the car,

the train at that time being in motion, going at the rate of about ten miles an hour. He fell with his leg under the rear wheels of the car, and it was crushed. Being taken to the hospital, his leg was amputated at the knee joint. There was a conflict of testimony as to who was the person that kicked the plaintiff from the car; but there was sufficient evidence to sustain the verdict of the jury that the act was done either by the conductor or by one of the servants of the company employed upon the train.

Frank Loomis, for appellant.

Nelson, Smith & Leavitt, attorneys, and *Nelson Smith*, of counsel, for respondent.

BY THE COURT.—HORACE RUSSELL, J.—At the close of the plaintiff's testimony, the defendants moved for a dismissal of the complaint, on the ground that it appeared that the act complained of by the plaintiff was not within the scope of any authority of the defendant's servant, but was his own unauthorized, willful and malicious act. The same point, substantially, was taken in a variety of forms at various stages of the trial. The judge charged the jury on this point as follows: "If you believe the plaintiff was kicked off the car by a servant of the defendants', and that such act of such servant was not within the scope of the employment of such servant, the defendants are not liable; but I have charged you, in connection with this proposition, that if you believe it was a servant of the defendants' who did it while performing that service, and not for a wicked and willful purpose of his own, then the defendants are liable." Exception was also taken to that portion of the charge of the judge which instructed the jury that the plaintiff might recover if the act was done by servants of the defendants other than the conductor. When this case was tried before, in April,

1877, the judge dismissed the complaint on the ground that it appeared that the act done to the plaintiff was a willful and malicious act of the person who did it, and was not done in pursuance of his duty under his employment. This was held error (12 *J. & S.* 1). There has been some vacillation in the law relating to the point in question, but the following propositions seem to have been finally and firmly established: (1) That whether a wrongful act done by a servant of a railway company, not entirely inconsistent with the nature of his employment, was done by him in pursuance of his employment and to serve the interests of his employers, or wickedly and maliciously, out of his own personal spite, is always a question for the jury; (2) that where the jury find such act to have been done in pursuance of the servant's employment and to serve the interests of the employer, the employer is liable. (This case at Gen. Term, *supra;* Rounds *v.* D. L. & W. R. R., 64 *N. Y.* 129; Isaacs *v.* Third Ave. R. R., 47 *Id.* 122; Cohen *v.* Dry Dock, East Broadway, &c., R. R. Co. 8 *J. & S.* 368; affirmed, 69 *N. Y.* 170; Jackson *v.* Second Avenue R. R., 47 *N. Y.* 274; Mott *v.* Consumers' Ice Co., 73 *Id.* 543; Peck *v.* New York Central & H. R. R. Co., 70 *Id.* 587; Garetzen *v.* Duenckel, 50 *Mo.* 104; Bayley *v.* M. S. & L. R. R., *L. R.* 8 *C. P.* 148; S. C., in Ct. below, *L. R.* 7 *C. P.* 415; Poulton *v.* L. & S. W. R. Co., *L. R.* 2 *Q. B.* 534; Oliver *v.* Northern Trans. Co., 3 *Oregon*, 84).

The distinction urged in reference to the conductor and other servants of the company, has no recognition in the authorities. In Bayley's case, above, it was a porter who did the wrongful act. In R. W. R. R. Co. *v.* Hack (66 *Ill.* 238), it was a servant employed to clean the cars. In Lovett *v.* Salem R. R. Co. (9 *Allen*, 557), it was the driver who simply ordered a boy to jump off while the car was in motion. In Cohen's case (*supra*), it was the driver of a horse-car which ran

against the plaintiff's wagon. In Rounds' case (*supra*), it was a baggage-man who kicked the plaintiff from the car.

In his charge to the jury, the learned judge at the trial said: "The evidence comes, so far as the plaintiff's side of the case is concerned, from Mr. Vogel and from this young man, a very intelligent and I think truthful youth—I mean, so far as a desire to tell the truth is concerned, but who was eight years old at the time the thing happened." To this remark the defendant excepted, whereupon the judge said, "I did think so, but I did not say that for that reason he ought to be believed." This exception was pressed on the argument.

All questions of fact, including the credibility of witnesses, are for the jury. The judge at a trial ought not to express an opinion on a question of fact, or on the credibility of a witness, however difficult it is sometimes not to do so; but an expression of opinion like this, which now and then escapes the lips of a judge, is not good ground for an exception. And certainly not in view of the qualification which the learned judge subsequently added, which distinctly gave the jury to understand that the question, whether or not the witness should be believed, was for them (Vale *v.* Rice, 5 *N. Y.* 155; N. Y. Fireman's Ins. Co. *v.* Walden, 12 *Johns.* 513; Stettiner *v.* Granite Ins. Co. 5 *Duer.* 594; Reed *v.* Hurd, 7 *Wend.* 408; Hager *v.* Hager, 38 *Barb.* 92; Althorf *v.* Wolfe, 2 *Hill.* 344; Bruce *v.* Westervelt, 2 *E. D. Smith*, 440; Durkee *v.* Marshall, 7 *Wend.* 312; Jackson *v.* Packard, 6 *Id.* 415). Besides, if the defendants' counsel was dissatisfied with this expression of opinion from the judge with the qualification subsequently made, his duty was to ask the judge, distinctly to submit the question of credibility to the jury (Dows *v.* Rush, 28 *Barb.* 157; Carnes *v.* Platt, 6 *Robt.* 270;

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Mallory *v.* Tioga R. R., 36 *How. Pr.*, 202; S. C., 3 *Keyes*, 354).

The books kept at the police station and at the hospital, reciting the injury to the plaintiff when brought to those places, were properly excluded. Those books were kept only for the purposes of those institutions, and the entries were made, not by persons having knowledge of the facts recited, but from such information as they could get from other sources; and there was no proof that that information came from the plaintiff so as to bind him as to an admission. Under no rule were they admissible.

The other exceptions in the case I do not regard of sufficient importance to demand discussion.

The judgment should be affirmed, with costs.

SPEIR, J., concurred.

GEORGE R. WHITMAN, ET AL., RESPONDENTS, *v.* ABEL HORTON, APPELLANT.

Factor—action to foreclose lien.—Evidence—books of account.—Objection to, when waived—when admission of without preliminary proof not error.—Counter-claim—when cannot be withdrawn.

A factor may bring an equitable action to foreclose his lien upon goods of the consignor in his possession for general balance of account, and is entitled therein to judgment for deficiency after the sale of the consigned goods.

Where plaintiff's books of account have been used in evidence by both parties for several days, and an expert has, by stipulation, made summaries of the entries therein, which were regarded as evidence for the defendant, it is too late for defendant to object to the admission of said books on the ground that the proper preliminary proof to justify their reception as original evidence, has not been given.

Books of account in which the book-keeper has made the entries upon

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information from other persons or from other books, cannot be admitted in evidence merely upon his testimony as to their general accuracy.

Where the person who conducted the business and made the entries in that portion of plaintiffs' books which relates to the question in controversy, testifies that such entries are in his handwriting, and are correct; it also appearing that during the period of the transactions involved, accounts were rendered to defendant from time to time, and by him compared with said books, and settlement and correction of any differences made, and that a final account had been rendered to defendant, upon which he had made a payment, and which was treated by all parties as an account stated, the referee's finding agreeing therewith, and with the expert's summary—the admission of said books in evidence without the technical preliminary proof as to their correctness, &c., does not constitute such error as to justify interference with the judgment.

Where the defendant has set up a counter-claim, based on transactions directly involved in the accounting for which the action is brought, the court is justified in refusing to allow defendant to withdraw it at the close of the testimony.

Before SEDGWICK, Ch., J., and SPEIR and RUSSELL, JJ.

Decided December 6, 1880.

Appeal by defendant from a judgment entered upon the report of a referee.

This is a suit in equity, brought by the plaintiffs as commission merchants, to foreclose by judicial sale, their lien on certain goods in their possession belonging to the defendant, their consignor; and for a judgment for the amount of their over-advances. The plaintiffs, as commission merchants, received from the defendant, between March 30, 1872, and January 6, 1876, a large quantity of woolen goods, to be sold by them upon the usual commissions and charges; and from time to time they advanced to the defendant moneys, on account of the goods consigned to them. This business terminated in January, 1876, at which

time the plaintiffs had in their possession a quantity of goods consigned to them by the defendant, which, by reason of their being out of style, were not marketable, of the value of about $1,200; and the defendant was indebted to the plaintiffs for their advances to him, to the amount of something over $5,000. After various negotiations, the plaintiffs gave the defendant notice to take away his goods and repay to them the amount of their over-advances, or they would sell the goods in their possession at auction, and hold him for the deficiency. This the defendant by letter forbade them to do, and demanded that the goods remaining in their possession should be sold in the usual way, or he would hold them for damages. Thereupon the plaintiffs brought this action. The referee found that there was due the plaintiffs, at the date of his report, the sum of $5,394.44, for which they were entitled to judgment; that the goods remaining in their possession should be sold at judicial sale, and, after the application of the amount received to the payment of the plaintiffs' judgment, the plaintiffs should have judgment against the defendant personally for the deficiency.

Walsh & Eckerson, for appellant.

Henry Stanton, for respondents.

BY THE COURT.—HORACE RUSSELL, J.—I have carefully examined the evidence, and am satisfied that, not only were the referee's findings of fact sustained by evidence, in which case courts are not in the habit of reversing findings of fact, but that the weight of evidence clearly preponderated in favor of the findings of the referee.

The motion to dismiss the complaint was made at the close of the testimony upon two grounds. (1) That it did not state facts sufficient to constitute a cause of

action. (2) That there was not sufficient evidence to entitle the plaintiffs to the relief asked for. The second objection may be regarded as disposed of by what has already been said with reference to the referee's findings of fact. The first objection—that the complaint did not state sufficient facts to constitute a cause of action—seems to have been based upon the theory that such an action as this by a factor against his consignor could not be maintained; that the only remedy of a factor against his consignor for advances, was to sell either in regular course of business or at auction, upon notice to his consignor, the goods remaining in his possession, and then bring an action at law for the deficiency. The authorities cited in support of this proposition: Gihon *v.* Stanton (9 *N. Y.* 476), Mattram *v.* Mills (2 *Sandf.* 189), *Edwards on Factors & Brokers*, 40, 41; Corlies *v.* Cummings (6 *Cow.* 184), 3 *Wait Actions & Defenses*, 297, do not go to the extent claimed. They only hold that before a factor can bring his action at law for the amount of his over-advances, he must first exhaust the primary fund or property in his hands.

A factor, as such, has a lien upon all the goods which come into his hands, for his commissions and advances, and may retain the goods and proceeds, not only for the charges incident to the particular goods consigned, but for the balance of his general account (*Edw. on Bailm.* 280, 281, 308, 309; Bradford *v.* Kimberly, 3 *Johns. Ch.* 431, 434; Brownell *v.* Curtis, 10 *Paige*, 205, 210; Brooke *v.* Bryce, 21 *Wend.* 16, 17; 2 *Kent Comm.* 640).

The factor may enforce his lien by civil action of an equitable nature, like the former bill in chancery. "A court of equity will, in case of principal and factor, entertain jurisdiction" (1 *Story Eq. Juris.* §§ 464, 506; 3 *Black. Comm.* 437). "Satisfaction of a lien may be enforced by a bill in chancery" (2 *Kent Comm.* 643).

Opinion of the Court, by RUSSELL, J.

"The factor is generally regarded in the decisions as invested with the rights of a pledgee of the goods intrusted to him, and charged with very nearly if not the same responsibilities (*Edw. on Bailm.* 213, 220). The law, as at present established, leaves an election to the pawnee. He may file a bill in equity against the pawnor for a foreclosure, and sell, or he may proceed to sell *ex mero motu* upon giving notice of his intention to the pledgor, but a judicial sale is most advisable in cases of pledges of much value, as courts watch any other sale with uncommon jealousy and vigilance, and any irregularity may bring its validity into question (*Story on Bailm.* § 310; *Edw. on Bailm.* 249, 250; 2 *Story Eq. Juris.* § 1033).

Not only on the grounds already stated, but because the plaintiffs stood in a fiduciary relation to the defendant—so that an accounting between them was necessary—had they a right to bring their action in equity. Their right to a judgment for a deficiency after sale of the consigned goods, is no less clear. "A factor advancing money on goods in his hands, is not confined in his remedy for the advances to the goods or fund deposited. He gives a joint credit to the fund and to the person of his principal" (*Edw. on Bailm.* 282; Corlies *v.* Cummings, 6 *Cow.* 181, 184; Marfield *v.* Goodhue, 3 *Coms.* 62, 73; Burrill *v.* Phillips, 1 *Gal.* 360; Peisch *v.* Dickson, 1 *Mason*, 9; Upham *v.* Lefavour, 11 *Metc.* 174). The action then was properly brought and in proper form.

The proper preliminary proof was not made to authorize the introduction in evidence of the plaintiffs' books of account at the time when they were introduced, nor was that lack cured by the subsequent technical proof. The book-keeper had made the entries introduced in evidence, upon information from other persons or from other books. His testimony, therefore, as to the general accuracy of the books, did not make

them admissible in evidence (Gould *v.* Conway, 59 *Barb.* 355; Burke *v.* Wolfe, 38 *Super. Ct.* 263). But an examination of all the other evidence in the case makes it quite apparent that the defendant's objection on that subject was too late. The books had already been used in evidence for several days, and by both parties to the suit. The expert had, by stipulation, made summaries of their entries, which were regarded as evidence for the defendant. Then, too, that portion of the books which related to the question really in controversy was traced to the person who conducted the business and made the original entries, who appeared, and testified that the entries of transactions were in his handwriting, and were correct. It also appeared, that during all the time of the business which was the occasion of this controversy, the defendant had his desk in the plaintiffs' office; that from time to time, when his account was rendered to him, he was in the habit of going over the account and the books with the book-keeper, and whatever differences arose were the subject of negotiation and settlement. A final account was rendered to him shortly before he left the plaintiff's place of business, which by all the parties seems to have been treated as an account stated; the defendant thereafter paid on account thereof the sum of $500. This final settlement of account, the expert book-keeper's memorandum from the books, and the referee's finding of fact, all substantially agree, so that the introduction and reception of the books without the technical proof referred to, did not, under the circumstances, constitute such error as to justify any interference with the judgment.

At the close of the testimony, the defendants, who, in their answer had set up a counter-claim, asked leave of the referee to withdraw it. His refusal to grant the request is made the subject of exception. I do not think there was any error in this. The plaintiffs sued

for a balance, after giving the defendant credit for all those things which were the subject of his counter-claim. The action was in the nature of an accounting. Testimony had been fully taken in regard to all the claims of both parties. The referee did right in refusing, at that stage of the action, to permit the defendant to withdraw his claims, whether they be called counter-claims, or items which should be credited to him in the accounting. All the matters in controversy ought to have been determined as they were in one action (Miller *v.* Freeborn, 4 *Robt.* 608; Wilder *v.* Boynton, 63 *Barb.* 547). The other exceptions in the case do not seem to be of sufficient importance to require discussion.

I think the judgment should be affirmed, with costs.

SEDGWICK, Ch. J., and SPEIR, J., concurred.

MEMORANDA

OF

CASES NOT REPORTED IN FULL.

VEDDER VAN DYCK, AS RECEIVER, &C., APPELLANT, *v.* CHARLES JONES, RESPONDENT.

Liability of indorser who has not received notice of presentment and non-payment — how revived — conditional acquiescence by indorser in charge of such check to his bank account—effect of.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided January 5, 1880.

Appeal from judgment dismissing the complaint.

The action was brought to charge the defendant, as indorser, with the amount of a certain check of Patrick E. Reed, of the presentation and non-payment of which the defendant was not notified according to law. With a single exception, there was no evidence in the case that the defendant admitted or recognized a liability, on his part, to pay the check.

This exception relates to the giving of two certain checks on July 12, 1877. One of these was the check of Thomas B. McQuade, bearing date on that day, drawn upon the Yorkville Savings Bank in favor of the defendant, for the formal transfer of a balance of $589.05, claimed by McQuade to stand in his favor upon the books of the bank under a certain arrangement made between himself and other persons, including the defendant, on the one side, and the bank on the

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other side, for the transfer of balances; and the other was the check of defendant's firm, also bearing date of that day, drawn upon the Bull's Head Bank to the order of the defendant, for $462.58, and indorsed by him. Up to this time, the defendant had insisted that he was not liable, but on the day named he delivered the checks referred to to the secretary of the Yorkville Savings Bank, in settlement of the balance claimed to stand against him by reason of the Reed check having been charged to his account. Such delivery took place after the said bank and its officers had been enjoined from continuing business, but the checks came into plaintiff's hands when he took possession of the assets of the bank as receiver, after his appointment as such, and the plaintiff, with knowledge of the circumstances under which they were given, retained them without objection or offer to return them; and before the commencement of this action he collected from the Bull's Head Bank the amount of the check drawn upon the latter.

The court, at general term, held, that in the absence of any admission or recognition of his liability to pay the check, by the defendant, the referee was right in his conclusions and views, and further said:

"The giving of the checks, under these circumstances, constituted only a conditional acquiescence by the defendant in the charge of the Reed check to his account, and the plaintiff had his election to accept or reject the acquiescence proffered. He could not affirm the transaction in part and repudiate it in part. The defendant not being then legally liable in any form, was at liberty to dictate the conditions upon which he was willing to settle the claim made against him and to insist that, at least so far as his account was concerned, the arrangement for the transfer of balances should be carried out. This being so, it is immaterial

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whether the arrangement for the transfer of balances as originally made, was, or was not, a valid one."

Ely & Smith, for appellant.

Alexander Thain, for respondent.

Opinion by FREEDMAN, J.; CURTIS, Ch. J., concurred.

Judgment affirmed, with costs.

MARY A. EGAN *v.* EDWARD T. WALSH, ET AL.

Before CURTIS, Ch. J., and SPEIR, J.

Decided February 2, 1880.

Appeal by a receiver, from an order of the special term confirming the report of the referee appointed to pass his accounts. Two charges for legal services were contested, one of which was reduced and the other disallowed by the referee.

W. J. Lacey, for receiver and appellant.

David Mitchell, for defendant.

PER CURIAM.—The order appealed from is affirmed, with $10 costs, and disbursements, to the defendants.

NATHANIEL D. HIGGINS, RESPONDENT, *v.* HENRY M. BARROWCLIFFE, APPELLANT.

Indorser has one day after receipt notice protest to serve prior indorser.—Parol evidence inadmissible to vary indorsement.

Before CURTIS, Ch. J., and SPEIR, J.

Decided February 2, 1880.

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Appeal by the defendant, from the judgment entered against him upon a verdict, and also from the order denying his motion for a new trial, made upon the judge's minutes.

The defendant by his answer put in issue the protest of the draft upon which he was sued as an indorser. He also controverted the allegation in the complaint, of due service upon him of the notice of protest, and alleged a parol agreement with one Higgins, releasing him from his indorsement. The court, at general term, said: "The evidence shows due presentation and protest of the draft, and service upon the defendant of notice thereof. The proofs fail to show any irregularity on the part of the notary, or the plaintiff. The plaintiff, as indorser, had one day after the receipt of the notice of protest within which to serve notice on the prior indorser (Farmers' Bank of Bridgeport *v.* Vail, 21 *N. Y.* 488; West River Bank *v.* Taylor, 34 *Id.* 128; Howard *v.* Ives, 1 *Hill*, 263).

"The defense also set up in the answer, that, by a parol agreement with one Elias S. Higgins, the defendant was not to be held liable on his indorsement, is not available, as Elias S. Higgins was not the owner of the draft, and could make no such agreement; and even if the defense had been properly pleaded, parol evidence is inadmissible to vary the implied contract of an unrestricted indorsement (Cottrell *v.* Conklin, 4 *Duer*, 50, and cases there cited; Bank of Albion *v.* Smith, 27 *Barb.* 489).

Thomas & Wilder, attorneys, and *Edward P. Wilder*, of counsel, for appellant.

Martin & Smith, attorneys, and *Aaron Pennington Whitehead*, of counsel, for respondent.

Opinion by CURTIS, Ch. J.; SPEIR, J., concurred.

Judgment and order appealed from affirmed, with costs.

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NATHAN VAN BEIL, APPELLANT, v. HENRY W. PRESCOTT, ET AL., RESPONDENTS.

Trade-mark—words "Rye and Rock" cannot be appropriated as such.

Before CURTIS, Ch. J., and SPEIR, J.

Decided February 2, 1880.

Appeal by the plaintiff from a judgment dismissing the complaint.

This was an action brought by the plaintiff to restrain the defendants from the use of the name "Rye and Rock," as applied to a mixture of rock candy dissolved in rye whisky.

Plaintiff, in his complaint, claims that he adopted, in 1878, the words "Rye and Rock" as his trade-mark.

The court, at general term, said: "We concur in the views of the learned judge at the special term that the words 'Rye and Rock' form a description of the article of which the liquid to which plaintiff applied the words is compounded, and, therefore, it is not a trade-mark. A trade-mark is an arbitrary sign or name. Any person who has a right to make the liquid has a right to give a description of it.

"We are also of the opinion that the plaintiff was not the first to adopt and use the words 'Rye and Rock,' as indicating the compound in question."

A. H. H. Dawson, for appellant.

John A. Foster, for respondent.

Opinion by CURTIS, Ch. J.; SPEIR, J., concurred.

Judgment appealed from affirmed, with costs.

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ELIZA M. SMITH, RESPONDENT, *v.* THE EXCHANGE FIRE INSURANCE COMPANY, APPELLANT.

I. FIRE INSURANCE.

1. Proofs of loss.

1. *Defectiveness of, when defense is not tenable.*

(*a*) Where no objection was made to the form or sufficiency of the proofs furnished or to the particularity of their details, and none were suggested at the trial which could not have been readily obviated to the extent of the duty to furnish created by the policy, if it had been suggested that greater minuteness of details was desired; and the company acted on the proofs furnished, and employed an adjuster to adjust the amount of damages, and the adjuster acted with the knowledge and co-operation of the assured, and concluded that the loss exceeded the whole sum insured by all the policies insuring the property; a defense that the proofs of loss were defective is not tenable.

Before CURTIS, Ch. J., and SPEIR, J.

Decided February 2, 1880.

This action was brought on a policy of insurance issued by defendant to Fitzhugh Smith. Loss, if any, payable to plaintiff's mortgagees.

The action was referred to J. S. Bosworth, who found the facts and law in favor of plaintiff. He wrote an opinion in which he held as set forth in the head-notes.

From the judgment entered on his report, defendant appealed to the general term.

W. K. Thorn, attorney, and *J. Langdon Ward*, of counsel, for appellant.

Charles M. Marsh, attorney, and of counsel, for respondent.

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PER CURIAM.—We have examined this case with reference to the very able and painstaking opinion of the learned referee, and see no good ground for differing with him in the result.

The judgment should be affirmed, with costs.

DANIEL R. KENDALL, RESPONDENT, *v.* HENRY P. NIEBUHR, AND OTHERS, APPELLANTS.

Before CURTIS, Ch. J., and SPEIR, J.

Decided February 2, 1880.

The judgment in this case was affirmed on the opinion at special term, which was adopted as that of the general term.

The case at special term is reported in 45 *N. Y. Superior Court Reports*, on page 542.

GEORGE S. SCOTT, APPELLANT, *v.* DANIEL SANFORD, RESPONDENT.

I. CONTRACT.

Rights of parties under a contract where one is to build a certain wall at the joint expense of both, and certain other things are to be done at the expense of the other.

1. CONTRIBUTIONS FOR EXPENSE OF WALL, WHEN CANNOT BE CALLED FOR.
   1. When the party who was not required so to do, built a wall, but not the one called for by the contract, he cannot call on the other for contributions.
2. EXPENSE OF OTHER THINGS.
   1. The fact that he has built a wall, for the expense of which he cannot call for contributions, does not relieve him from his obligation to pay for the other things, which were to be done at his expense.

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II. TRIAL, CONDUCT OF.

1. Evidence. Non-production of paper called for.

1. The fact that a party *declines* to comply with a notice *to produce, does not make the subsequent admission of a paper offered by such party, substantially differing* in its terms from the one called for, although bearing on the same subject-matter, *error calling for a reversal.*

Before CURTIS, Ch. J., and SPEIR, J.

Decided February 2, 1880.

The controversy arose out of the following contract (being Exhibit A).

"Whereas, George S. Scott, of 36 Broad street, New York, in improving and grading his lot in rear of lot No. 29 West 56th street, New York city, occupied by Daniel Sanford, removed the earth on his lot, supporting and keeping in place that upon said Sanford's lot, in consequence of which the rear of said Sanford's lot has caved or slided off, and by reason of the difference in the grade of said lots it becomes necessary that some erection be made to support and keep in place the rear of said Sanford's lot.

"It is hereby agreed that the said Sanford construct a wall wholly upon his own land and immediately adjoining the rear of said Scott's lot, as high as the surface grade of said lot No. 29, and sufficiently strong to support the rear of said lot, at an expense not exceeding one hundred and eighty dollars, the expense of which shall be equally divided between said Scott and Sanford.

"The cesspool and flagging, and fence upon said Sanford's lot, injured or destroyed by the said Scott in improving his said lot, to be restored and made good at the sole expense of and by said Scott.

"In witness whereof, the said parties have hereunto set their hands and seals this 25th day of November, 1872. "GEO. S. SCOTT. [seal.]

"DANIEL SANFORD. [seal.]"

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From the evidence it appears that Scott constructed the wall on his own land.

There was conflicting evidence as to the expense of restoring the cess-pool, &c., on Sanford's lot.

In the course of the trial, defendant having been called on (pursuant to notice) to produce a contract whereby *plaintiff* was to employ a mason to build a wall between his lot, and defendant's lot adjoining thereto on the rear, declined to produce it. Subsequently defendant offered to read in evidence, the paper previously marked "Deft's Ex. A. for identification" as the written agreement between the parties.

Plaintiff objected to its introduction, on the ground that defendant, having refused to produce the written agreement when plaintiff called for it on the trial, in accordance with plaintiff's previous written notice to produce it, and having allowed plaintiff to give secondary evidence of the contents of that agreement, and having cross-examined plaintiff respecting its contents, cannot offer it in evidence now.

The objection was overruled. An exception was taken. The written agreement was admitted, and to its admission plaintiff objected and excepted.

The court charged the jury: "This paper (Exhibit A.) undoubtedly constitutes the contract between the parties upon which their rights and liabilities depend. Under this agreement it was not the duty of the plaintiff to build the wall, but the duty of the defendant. (The plaintiff having built another wall, and one, as the evidence stands, entirely on his own ground, which the contract does not call for, and which the law does not imply a request that it should be done, he cannot recover anything for the building of the wall.)" (To which portion of the charge included in brackets plaintiff's counsel excepts.)

"On the other hand, the contract provides that the plaintiff shall stand the expense of repairing the cess-

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pool, flagging and fence to the same condition in which they were before they were injured, and the defendant is entitled to recover whatever he may have reasonably expended in that regard.

"Now there is a difference between the testimony of Mr. Rogers and the testimony of Mr. Hogencamp, as to what was a reasonable amount to be expended for that purpose, and that question I submit to you."

Plaintiff's counsel requested the court to rule that if by reason of the contract not having been complied with, no liability was imposed upon the defendant, the plaintiff is equally released from liability.

The request was declined and an exception taken.

The jury brought in a verdict for the defendant against the plaintiff, assessing the damages at the sum of ten cents.

Plaintiff's counsel moved for a new trial on behalf of plaintiff, on all the grounds in section 999 of the Code.

Motion denied; exception taken.

From the order denying the motion and the judgment entered upon the verdict, plaintiff appealed.

Adolphus D. Pape, for appellant.

A. C. Chapin, for respondent.

PER CURIAM.—Judgment and order affirmed, with costs.

MARY E. LUCKY, ET AL., APPELLANTS, *v.* ANN M. ODELL, RESPONDENT.

Property purchased by husband in his own name, with wife's funds, under agreement with her that title should be taken in joint names—wife may purchase on foreclosure sale, though husband has died leaving children of which she is guardian in socage—admissions of husband as to purchase, &c., with wife's funds, admissible against heirs.

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Before CURTIS, Ch. J., and SPEIR, J.

Decided March 1, 1880.

This is an appeal from a judgment of the special term, dismissing the complaint.

The plaintiffs are children and heirs at law of James M. Odell, who died intestate on January 31, 1864, leaving the mother of said children his widow.

At the time of the death of James M. Odell, he was seized of the record title to certain real estate which is described in the complaint, and on which there was a certain mortgage for $500.

After his death an action was begun for the foreclosure of said mortgage, to which all parties to the present suit were parties, which resulted in a judgment for the mortgagee for the sum of $744.22, principal and interest, and for a sale of the mortgaged premises. Pursuant to this judgment the property was sold by the sheriff on October 18, 1864, and purchased by the defendant (according to leave contained in the judgment), and the sheriff duly executed a deed to her as the purchaser. The present plaintiffs being infants were all duly represented in the foreclosure proceedings by their guardian *ad litem*.

The action was brought on the theory that the defendant at the time of the sale and purchase under the foreclosure proceedings was guardian in *socage* of the plaintiffs, and as such was precluded from buying the property on her own account; and judgment was demanded awarding the title to the plaintiffs as heirs at law of James M. Odell, defendant's husband, and for the partition of the property and an accounting as to rents and profits.

The answer alleged, among other things, that the property was originally purchased with defendant's money, under an agreement with her husband that the

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title be taken in their joint names, and it further alleged that she never discovered that the title had been otherwise taken, till after her husband's death.

The court below found that the property was purchased by James M. Odell with the defendant's money, pursuant to an agreement that the property was to be held for the joint benefit of both; that the husband acted in reference thereto as agent of the defendant; that it was his intention at the time of the purchase of the premises that the same should remain and continue the property of himself and wife; and that she so understood it at the time of the purchase; and thereafter both husband and wife continued to use and occupy the premises as a home for themselves and children until his death.

The court, at General Term, after consideration of testimony showing certain admissions made by the deceased in his lifetime, that the property was bought by him with defendant's money, &c., said:

"The declarations of the intestate were admissible. It was shown that he is deceased, that he possessed competent knowledge of the facts or that it was his duty to know them, and that the declarations were at variance with his interest. These admissions are admissible in evidence against the representatives in the same manner as they would have been against the intestate (1 *Greenl. Ev.* §§ 147–155, 189).

"The defendant had the right to purchase at the sale not only because she was authorized by the judgment in the foreclosure action to do so, but being vested as survivor with the fee of the property, she could protect her rights and interest by bidding in the same for her own exclusive benefit and advantage."

Culver & Wright, attorneys, and *S. Jones*, of counsel, for appellants.

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George W. McAdam, attorney, and *James Clark*, of counsel, for respondent.

Opinion by SPEIR, J.; CURTIS, Ch. J., concurred.

Judgment affirmed, with costs.

GERTRUDE E. ARMITAGE, RESPONDENT, *v.* DANIEL MACE, APPELLANT.

Gift—what necessary to constitute—when question for the jury.—Value of chattel—what evidence of.—Livery-stable-keeper's lien.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

This action was for the recovery of the possession of a mare claimed by the plaintiff to be her property. Her title was disputed by defendant. On the trial, the court directed a verdict for plaintiff. The defendant had received from the husband of plaintiff the possession of the horse. In this and all other dealings with defendant, the husband acted as if on his own behalf, and not as if her agent. The question on the trial was, whether the husband had ever made a gift to her of the horse. Several witnesses said that the plaintiff owned the mare, or that the husband had presented it or given it to the plaintiff. Plaintiff testified that her husband said to her: "I will give you the horse and that she should be mine." This was said at a place where there could be no actual delivery, and there was no testimony as to a symbolical delivery. Beyond this, the evidence did not make it certain that there had ever been any change of possession of the horse.

The court, at General Term, after holding that if the testimony did not fail to show title by gift, it should have been submitted to the jury, with instructions as

to the legal requirements of a gift,—and further, that the testimony of plaintiff's witnesses as to the gift to her was not conclusive, involving a construction of what constituted a gift, or an inference from facts in evidence—proceeded:

"The jury would have been at liberty to find that the horse had always remained in the husband's possession, and that he without interruption exercised acts of dominion, in his own right, over it. If the words that have been taken from the testimony of the plaintiff implied that there was a present intention to give rather than a promise to give, and which the jury should have determined, it was necessary also to show that there had been a contemporaneous delivery and acceptance.

"It is proper further to say that no evidence was given of the market value of the horse, and that the price for which the plaintiff sold it was not evidence against the defendant of the real value (Roe *v.* Hanson, 5 *Lans.* 305).

"I think there can be no doubt that if the defendant took possession of the mare, under the agreement set out in the reply, he could have no lien for care and board, under chapter 98 of Laws of 1872, until some new agreement for care, board, &c., should be made. If it is supposed that there might be a lien, for the keeping of the horse, after a date, when, it is assumed, the first agreement came to an end, it is sufficient for the purpose of this case to say, that the notice of lien failed really to make the lien under the statute, because it was for the keep, before as well as after October 20. So long as the defendant kept the horse under the provisions of the agreement set out in the reply, the husband of plaintiff or the plaintiff was not liable for the keeping, &c. There was a joint adventure (*i. e.*, for "entry into races, and for sale"), and the defendant agreed to "furnish and provide livery, keep, board, shoeing, training and transportation for said" mare.

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Peter Mitchell, for appellant.

Edwin Kempton, for respondent.

Opinion by SEDGWICK, J.; FREEDMAN, J., concurred.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

HENRY J. HOFFMAN, RESPONDENT, *v.* S. LIVINGSTON, APPELLANT.

Principal and broker—when fiduciary relation exists between—when commissions not recoverable, services rendered by broker being of no value, but mode of transacting business having been left to him.—Jury trial ordered on reversal.

Before SEDGWICK, SPEIR, and FREEDMAN, JJ.

Decided April 5, 1880.

The action is brought by the plaintiff, a stock broker, against the defendant as his principal, claiming a balance of the account against her, which wholly consists of charges for services under the name of commissions.

The contract between the parties was made at two interviews between them, and is stated by the plaintiff in substance as follows: The defendant at the first interview said that she had been trading in stocks and had lost $800 on one hundred shares of stock in another office, and asked the plaintiff if he would take her account in his office. He told her he would consult with his partner and see what he thought of it, and would let her know. In two or three days after this he told the defendant that he had seen his partner, Mr. Ryan, who did not care about speculating, not being in the

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office himself, but that the plaintiff had made arrangements with him to take it in the office on his own responsibility. He then told her that the New York Exchange imposed a condition of one-eighth per cent. each way to a party not a member of the Stock Exchange. She said she understood this—that she had speculated in stocks before, and did not wish him to buy or sell stocks, and to hold on to them, but desired him to make her account active, by buying and selling stocks at small differences where larger ones could not be gotten. Plaintiff told her he would require a letter from her holding herself liable for the transactions he made, and she said she would sign such a letter, provided he would draw it up and send it to her, and that she wished to begin with a deposit of $1,000. He asked her whether she wanted to limit him to any amount of stocks to be bought or sold. She said no, that must be conducted according to his own judgment and to the best of his ability—that she left it wholly to him as to when to buy stocks and when to sell them, and what amounts.

The letter was prepared by the plaintiff, sent to and signed by the defendant, being ante-dated three or four days. The defendant does not vary the plaintiff's narration of what occurred at these interviews, except as to how long and what experience she had had in stock speculations.

The court, at General Term, said: "It is plain from the verbal arrangement between the parties, as also from the whole case, that the plaintiff's partner was a member of the Stock Exchange, and that the *plaintiff* was not a member, but conducted the business through the agency of his partner, while he took upon himself the whole responsibility and secured the profits. It is presumed it was for this reason that he told the defendant that the Stock Exchange imposed a commission of one-eighth per cent. each way to a party *not a member*

of the board. The phraseology here used is significant. Could any one doubt that if the plaintiff had been dealing with a person of experience, and accustomed to habits of business, the question would have been asked what was meant by such a statement? For what purpose was the account taken by one member of a firm of brokers, who was not a member of the Board, while the other was a member and attended the Exchange to buy and sell upon orders, unless there might be a commission each way to a party not a member of the Stock Exchange? This certainly was not a statement which would be likely to inform the defendant that she would be obliged to pay plaintiff a commission of one-eighth per cent. on each transaction, and goes far to support her assertion under oath that in her interviews with the plaintiff the subject of paying a commission was never mentioned. The first information as to the commission charge the defendant had, was by a letter from Mr. Anderson, and such was her confusion and simplicity that she sent the letter to the plaintiff, her agent, confessing that she could not understand it, and asking him to see Mr. Anderson, her friend, and explain to him.

"The ground of defense relied upon to defeat this action is, that under the verbal contract as stated by the plaintiff, he had failed to transact her business confided to him with that amount of prudence, ordinary skill and diligence which she had a right to expect at his hands, and that therefore he is not entitled to his commissions for that service. The want of ordinary skill and diligence in every case must in a great measure depend not only upon the ability of the parties and their knowledge and experience in dealing with the subject in hand, but also the character of the engagement under which the parties act. It is stated by the plaintiff "that he asked her whether she wanted to *trust* him as to any amount of stocks to be bought or

sold; she said that must be conducted according to his own judgment and to the best of his ability—that she left it wholly to him when to buy and when to sell." It seems to us that the relation established between the parties was of a fiduciary character and largely imposed confidence and good faith in discharge of the duties assumed by the plaintiff. The defendant is a woman not usually accustomed to dealings of this kind, and the conduct of the parties in these interviews shows her implicit trust in her agent. It is true he represents her as claiming to be a stock speculator and having knowledge of the business. In his examination of her as to her experience in stock speculations she states under oath 'that she had only one transaction with Mr. Colvill, who had bought a hundred shares of Western Union four or five times, which took about two years to do it in.'

"The assertion of the plaintiff as to this employment to manage the business in his own way without interference as to the limit of the amount of stock to be bought or sold, is claimed to be a justification of the manner in which he transacted the business, whether or not it resulted in his or his principal's loss. By an analysis of the accounts taken from the plaintiff's books by competent evidence, the following clearly appears:—

"The first transaction by the plaintiff in his employment took place on August 17, the date of the guaranty letter, and the last on December 27, same year. There were one hundred and seventy-eight purchases and one hundred and seventy-eight sales in one hundred and eleven days, which shows more than three operations per day. At the close of the account, on December 27, 1875, the net loss was $4,087.50, and the amount of the commissions was $4,400. This was exclusive of the margin of $1,000 given to the plaintiff at the beginning of the transaction. It also appears from the classifica-

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tion made that the purchases and sales effected on the same day in which the difference of price does not exceed the commissions is seventy-two. As early as the 15th of September,—less than one month from the beginning of the employment,—the net loss to that date amounted to $862.50, while the commissions charged at the same time footed up to $800, so that all the apparent loss, except $62.50, consisted of commissions.

From the tabulated accounts—by which the account annexed to the complaint is classified, showing in detail the items of the whole, it is proven that stocks were bought in the morning and sold at the same, or nearly the same price, in the afternoon. The same thing occurred on the following day, and the same disposition made again in a few hours without regard to the loss suffered by the principal, and the regular fee charged as commission for services. An examination of any of the intermediate dates of the account will furnish the same result. The purchases and sales always about balance each other. The balances constantly growing against the principal, consist almost entirely of the charges for commissions.

The plaintiff, during the time of these transactions, wholly failed to give the defendant notice and information of the exact condition and state of her account in his hands, by which she could see at any time that in the end it would prove to be an irremediable loss to her and of profit to her agent. This method of doing business pursued by the plaintiff, was condemned by all the experts examined, not only as improper but as against the usual and customary mode of doing business by brokers in such cases.

It being clearly shown by the testimony that in this business the custom was always to give the proper notice of each transaction in detail, the plaintiff must be assumed to know it, and to have undertaken to perform

his duty accordingly; failing to do so charges him with neglect of duty.

As matter of fact, the referee has found that the plaintiff did not at any time communicate to her specifically what the particular charges by way of commissions amounted to, or the fact that the majority of his transactions were effected at so small a margin of difference between the cost of the purchases and the prices realized after sales that no profit could have resulted to the defendant therefrom.

The question is one of due diligence and ordinary skill. Whether or not one has exercised such skill and diligence is usually a question of fact. If it be the result of inattention or incapacity or of an intent to defraud, an omission in either case is equally a breach of plain duty and a grievous wrong to the principal. It is not sufficient that the plaintiff has been guilty of no fraud or of no such gross negligence as could carry with it the insignia of fraud. "The position" says RAPALLO, J., in Heinemann *v.* Heard (*N. Y.* 35), "cannot be maintained that fraud on the part of the agent is necessary to subject him to an action for neglecting to perform a duty which he has undertaken" (*Story on Agency*, §§ 183, 186).

In Denew *v.* Deverell (3 *Campbell*, 451), LORD ELLENBOROUGH directed the jury that if the plaintiff's services were found to have been wholly abortive, he was entitled to recover no compensation. He gives this sensible and practical reason for the rule: "I pay an auctioneer for the exercise of his skill in my behalf which I do not myself possess, and I have a right to the exercise of such skill as is ordinarily possessed by men in that profession or businesss. If from his ignorance or carelessness he leads me into mischief he cannot ask for a recompense, although from a misplaced confidence, I followed his advice without remonstrance or suspicion."

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Again, if the duties of a broker are executed in such a manner that no benefit results from them he is not entitled to recover either his commission or even a compensation for his trouble (Hammond *v.* Holliday, 1 *Carr. & Payne*, 384).

We are of the opinion that the finding that the defendant acquiesced in what the plaintiff was doing and his manner of doing it cannot be sustained upon well settled principles of law; that there can be no acquiescence in the absence of material facts which it was the plaintiff's duty to communicate to the defendant and which duty he failed to perform.

Anderson & Mann, for appellant.

Crosby & Hoffman, for respondent.

Opinion by SPEIR, J.; SEDGWICK and FREEDMAN, JJ., concurred.

Judgment reversed and new trial by jury ordered.

HENRY A. AVERY, ET AL., RESPONDENTS, *v.* GEORGE W. FERGUSON, ET AL., APPELLANTS.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided April 5, 1880.

Action to recover $493.25, the value of certain plate glass, the property of plaintiffs, which defendants converted to their own use.

Answer denied plaintiff's title and the conversion.

The jury found for the plaintiffs in the sum of $250.00, and defendants appealed from the judgment.

George H. Fletcher, for appellants.

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Childs & Hull, for respondents.

FREEDMAN, J., wrote for affirmance, with costs.

SEDGWICK and SPEIR, JJ., concurred.

ROWLAND C. HAZARD, ET AL., RESPONDENTS, *v.* JOHN R. CASWELL, ET AL., APPELLANTS.

Partnership—successorship in business, and consequent right to use of old firm name, trade-marks and labels—what sufficient evidence of.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal from judgment enjoining the use of a certain label and trade-mark.

The court below found that the plaintiffs were the sole successors of the firm of Caswell, Hazard & Co.

The court, at General Term, said: "The right to use the said firm name and trade-mark in question flows from such fact. There was more than a mere dissolution and division of assets. There was an actual continuance of the old business and firm name by the plaintiffs at all the established places of business, a transfer to them of the retiring partner's interest in whatever was characteristic of the old business,* and on the part of the retiring partner for several years a clear recognition of, and acquiescence in, the mode in which the plaintiffs did continue the said business and firm name. In four receipts signed by the retiring partner, the plaintiffs are expressly styled 'successors to the old firm.' These features distinguish the case at bar from Morgan *v.* Schuyler (21 *Alb. Law J.* 154). The facts being as stated, the plaintiffs had a right to bring themselves within the statute (*Laws* 1854, c. 400) per-

* See Adams *v.* Adams, 7 *Abb. New Cas.* 202.

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mitting the continuance of the firm name in certain cases, and as a consequence they are, upon all the facts found, entitled to the relief awarded to them."

Luke A. Lockwood and *John L. Hill*, for appellants.

Anderson & Howland, for respondents.

Opinion by FREEDMAN, J.; SEDGWICK, J., concurred.

Judgment affirmed, with costs.

EDWIN M. NEVILLE, APPELLANT, *v.* WILLIAM V. CHRISTIE, RESPONDENT.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal from judgment dismissing complaint at the trial.

Louis F. Murray, attorney, and *George M. Curtis*, of counsel, for appellant.

Miron Winslow, attorney, for respondent.

FREEDMAN, J., wrote for affirmance, with costs; SEDGWICK, J., concurred.

HENRY C. DART, RESPONDENT, *v.* WRIGHT GILLIES, ET AL., APPELLANTS.

Appeal—questions of fact, how brought up for review—entry on clerk's minutes, when deemed an order denying motion for new trial.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Statement of the Case.

This is an appeal from a judgment in favor of plaintiff, and also from an order denying defendant's motion for a new trial made on the judge's minutes.

The notice of appeal in the case at bar specifies that the defendants appeal from the judgment and also from the order denying motion for new trial upon the minutes, but no formal order denying said motion was ever entered. An entry appears in the clerk's minutes noting the fact of the denial of the motion.

The court at General Term said: "Defendants' exception to the denial of the motion for a new trial upon the minutes presents no question of fact for review. The only mode for reviewing that decision upon the facts is by an appeal from the order denying the motion (Gregg *v.* Howe, 37 *N. Y. Super. Ct.* 420; Matthews *v.* Meyberg, 63 *N. Y.* 656). For the purpose of such an appeal it was said in Gregg *v.* Howe, that an order must be entered. If the entry upon the clerk's minutes be treated as an order, as was done in Alfaro *v.* Davidson (39 *N. Y. Super. Ct.* 463), it should not be disturbed upon a question of fact, because no such ground was assigned for the motion, and no motion for the direction of a verdict had been previously made, and also because, at the close of the trial, the case, considered as a whole, was one which had to be submitted to the jury."

James M. Fisk, for appellant.

Wingate & Cullen, attorneys, and *Henry C. Andrews*, of counsel, for respondent.

Opinion by FREEDMAN, J.; SEDGWICK, J., concurred.

Judgment and order affirmed, with costs.

Statement of the Case.

FRANCIS BROWN, ET AL., v. GEORGE S. GUNNISON.

Before SPEIR and FREEDMAN, JJ.

Decided April 5, 1880.

Exceptions ordered to be heard at general term.

Tracy, Olmstead & Tracy, for plaintiff.

Thomas F. Byrne, for defendant.

PER CURIAM.—The exceptions must be overruled and judgment absolute ordered for plaintiffs, with costs.

ELIAS M. SPERLING, RESPONDENT, v. WILLIAM C. CONNER, SHERIFF, &C., APPELLANT.

Before SPEIR and FREEDMAN, JJ.

Decided April 5, 1880.

Exceptions heard in first instance at general term.

Vanderpoel, Green & Cuming, attorneys, *Almon Goodwin*, of counsel, for appellant.

Henry A. Root, for respondent.

PER CURIAM.—Exceptions overruled and judgment ordered for the plaintiff upon the verdict, with costs.

Statement of the Case.

FRANK C. OSBORN *v.* THE UNIVERSAL LIFE INS. CO.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal by defendant from an order denying the motion to strike out certain portions of the complaint as irrelevant and redundant. The order appealed from directs that the causes of action shall be separately numbered, and from that part of the order the defendant does not appeal, but the plaintiff does.

S. F. Kneeland, for plaintiff.

Sewell & Pierce, for defendant.

PER CURIAM.—That part of the order from which the plaintiff appealed should be reversed, such reversal having been consented to by the defendant on the argument, and the remaining part, from which the defendant appealed, should be affirmed, with costs to the plaintiff.

ADALINE T. SMITH, RESPONDENT, *v.* EZRA H. LINLEY, APPELLANT.

Before SEDGWICK and FREEDMAN, JJ.

Decided April 5, 1880.

Appeal from order settling case on appeal.

Arnoux, Ritch & Woodford, for appellant.

Randolph B. Martine, for respondent.

PER CURIAM.—The order appealed from should be affirmed, with costs.

Statement of the Case.

JOHN N. WHITING, APPELLANT, v. BENJAMIN M. PRICE, RESPONDENT.

Before CURTIS, Ch. J., and SPEIR, J.

Decided April 5, 1880.

Appeal from judgment.

Sewall Sergeant, attorney, and *A. J. Vanderpoel*, and *Almon Goodwin*, of counsel, for appellant.

George J. Peet, for respondent.

PER CURIAM.—Judgment appealed from affirmed, with costs to respondent.

ERNEST W. TABOR, APPELLANT, v. WILLIAM VAN TASSELL, ET AL., RESPONDENTS.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided May 3, 1880.

This is an appeal by the plaintiff from a judgment and order denying a motion for a new trial on the minutes.

This case involves only questions of fact.

Vernon & Hill, for appellant.

Hugh Reavey, for respondents.

SPEIR, J., wrote for affirmance, with costs; SEDGWICK and FREEDMAN, JJ., concurred.

Statement of the Case.

MARGARET ARCHER, RESPONDENT, *v.* LOUIS LEUBUSCHER, ET AL., APPELLANTS.

Before SEDGWICK, SPEIR and FREEDMAN, JJ.

Decided May 3, 1880.

Appeal by defendants from judgment and from order denying motion for new trial.

Wm. J. A. McGrath, for appellants.

D. & T. McMahon, for respondent.

PER CURIAM.—Upon examination of this case, we find no reason to disturb the verdict of the jury, or any ground of complaint against the charge of the judge.

The judgment and order must be affirmed, with costs.

THOMAS DONOVAN, AN INFANT, &C., APPELLANT, *v.* THE BOARD OF EDUCATION, &C., RESPONDENT.

Before SPEIR and FREEDMAN, JJ.

Decided May 3, 1880.

Appeal by plaintiff from judgment dismissing complaint.

Thomas & Wilder, for appellant.

Wm. C. Whitney, attorney, and *D. J. Dean*, of counsel, for respondent.

PER CURIAM.—The complaint avers injury sustained in November, 1875, by the plaintiff falling into a grating left open for the purpose of hoisting materials from the cellar in the yard of a public school building

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in the city of New York, in consequence of the negligence of defendant's servants.

The answer denies the foregoing allegations.

The testimony does not connect the defendant with the repairs, custody or control of the premises or the work which was going on when the accident occurred.

The Board of Education was not the employer or responsible superior of the persons by whose negligence the accident occurred. The case presents the facts as proven, which show that the negligent act was not a corporate or official act, or omission of a servant necessarily employed by it.

The complaint was properly dismissed, and the judgment should be affirmed, with costs.

CARL J. EHBETS, RESPONDENT, *v.* JOHN W. BIGELOW, APPELLANT.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Decided June 18, 1880.

Appeal by the defendant from a judgment for plaintiff entered upon a verdict for plaintiff for $347.

The case involves only questions of fact.

Sedgwick & Curtis, attorneys, and *George S. Sedgwick*, of counsel, for appellant.

Martin & Smith, attorneys, and *M. W. Divine*, of counsel, for respondent.

CURTIS, Ch. J., wrote for affirmance, with costs; SEDGWICK and FREEDMAN, JJ., concurred.

JAMES TALCOTT, RESPONDENT, *v.* JOSEPH P. BROUNER, ET AL., APPELLANTS.

Election of remedies—action by vendor against assignee of vendee to replevy goods sold—effect of compromise therein—when not bar to recovery of purchase price.

Statement of the Case.

Before CURTIS, Ch. J., and SEDGWICK and FREEDMAN, JJ.

Decided June 18, 1880.

Appeal from a judgment against the defendants for $5,089.94, entered upon a verdict directed by the court, and from an order denying the defendants' motion for a new trial upon the minutes.

The action is brought to recover $2,907.17 for goods sold and delivered. The answer admits the sale and alleges the goods were paid for by defendants' notes; that the defendants failed in business just before the notes fell due and made a general assignment to one Belding; that plaintiff rescinded the sale by bringing replevin for the goods against the defendants' assignee; that on the trial the notes were surrendered to the assignee and a judgment obtained against him, which was reversed on appeal; and that the plaintiff thereupon settled with the assignee and received from him a sum of money in full satisfaction for the goods. The plaintiff testified at the trial, that he had "never received a dollar from the whole goods;" that the notes had never been paid, and "that the goods sold had never been paid for." The bringing of the suit in replevin by the plaintiff against the assignee, and the final judgment against the plaintiff therein, were shown at the trial of the present action.

The court, at General Term, said: "There having been a legal adjudication by the appellate court, adverse to the plaintiff, he was remitted to such remedy as he might have against other parties than the assignee (Kinney *v.* Kiernan, 49 *N. Y.* 169). If he was mistaken as to his having a cause of action against the latter, it does not follow that he did not have one against the present defendants. The defendants offered to show a compromise and settlement by the assignee of the plaintiff's claim for the identical goods in suit

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after the reversal of the judgment by the general term. This was excluded by the court, and the defendants excepted. The offer was vague and immaterial. The assignee, as trustee, had no legal right to divert from their proper use and application the assignee's assets to the payment or settlement of a claim adjudged untenable as against him; nor would the settlement of an invalid demand against the assignee conclude the plaintiff from asserting a valid claim against the defendants."

W. B. Putney, attorney, and *Charles E. Soule*, of counsel, for appellants.

Chambers, Boughton & Prentiss, for respondent.

Opinion by CURTIS, Ch. J.; SEDGWICK and FREEDMAN, JJ., concurred.

Judgment and order appealed from affirmed, with costs.

STEPHEN D. PRINGLE, RESPONDENT, *v.* HENRY S. LEVERICH, ET AL., APPELLANTS.

Before CURTIS, Ch. J., and SEDGWICK, J.

Decided June 18, 1880.

Appeals by the defendant Leverich from orders made at the special term denying his motion for bill of particulars.

The orders were affirmed upon the ground that the books upon which the claim in suit was founded were open to appellant's inspection and under his control.

Platt, Gerard & Bowers, attorneys, and *J. M. Bowers*, of counsel, for appellant.

Stickney & Shephard, attorneys, and *Albert Stickney*, of counsel, for respondent.

Statement of the Case.

CURTIS, Ch. J., wrote for affirmance, with costs; SEDGWICK, J., concurred.

BARTHOLOMEW DESMOND, APPELLANT, v. ERNEST ROSE, RESPONDENT.

Contributory negligence—testimony susceptible of construction either for or against it not sufficient to rebut a presumption of its existence—where such diversity exists in testimony of single witness, complaint should be dismissed.

Before CURTIS, Ch. J., and SEDGWICK, J.

Decided June 18, 1880.

Appeal from judgment.

This action was for damages for injury caused by defendant's negligence. Upon the plaintiff's closing his case, the defendant moved to dismiss the complaint, on the ground that plaintiff had not given any testimony to show that he had been free from negligence. The motion was granted. By leave, the plaintiff was allowed to testify further in his own behalf. The motion was renewed, and again granted.

The court at General Term, after a review of the evidence which tended to show contributory negligence on the part of plaintiff, said:

"We are of the opinion that the learned judge at the trial committed no error in dismissing the complaint. The plaintiff could not make his case without proof that he was free from contributory negligence. If it were clear that the facts, on which, as matter of law, the jury must found a conclusion on this point, were susceptible of a construction that proved negligence equally with the opposite construction, much more, if the opposite construction had a greater weight of testimony, the jury would have no foundation for a judgment that there was no contributory negligence. It

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is a matter of law that if one credible witness for the plaintiff testifies to a certain state of facts necessary to the cause of action, and another equally credible witness swears to the opposite, and there is nothing to turn the scale one way or the other, the facts of the case are not proven. In such a case, however, it is generally left to the jury to say which is the more credible witness. But where the diversity exists in the testimony of one witness, such a consideration has no place."

A. B. Tappen, for appellant.

A. W. Knapp, attorney, and *John McKeon*, of counsel, for respondent.

Opinion by SEDGWICK, J.; CURTIS, Ch. J., concurred.

EUGENE VON NORDHAUSEN, APPELLANT, *v.* THE NEW YORK & HARLEM R. R. Co., RESPONDENT.

Before SEDGWICK and FREEDMAN, JJ.

Decided June 18, 1880.

Appeal from judgment.

This action was for damages, from negligence of defendants. After the testimony for plaintiff and for defendants had been given, the defendant's counsel moved to dismiss the complaint, and this motion was granted.

The court at general term affirmed the judgment, on the ground that the great preponderance of evidence was that plaintiff's negligence contributed to the injury.

Daily & Perry, for appellant.

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Chauncey M. Depew, attorney, and *Frank Loomis*, of counsel, for respondent.

SEDGWICK, J., wrote for affirmance, with costs; FREEDMAN, J., concurred.

JOSEPH NICKERSON, ET AL., RESPONDENTS, *v.* EMIL RUGER, ET AL., APPELLANTS.

Promissory note—what proof necessary for recovery on note given for accommodation or taken by fraud.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided June 18, 1880.

Appeal from judgment and order denying defendants' motion for new trial.

The action was upon a promissory note.

The court at General Term said: "The last trial seems to have proceeded strictly in accordance with the rule laid down by the court of appeals in 76 *N. Y.* 279. The defendants were allowed to show their equities, and the whole case was submitted to the jury with the instruction, in substance, that whether the note was given for accommodation or taken by fraud, the plaintiffs, before they could recover, had to show affirmatively, as part of their case, that they took the note before maturity, and that, when they took it, they took it without notice of defendants' equities, and either then parted with a valuable consideration on the faith of it, or agreed to part with a valuable consideration on the faith of it, and subsequently, before maturity and notice, did so."

G. W. Cotterell, for appellants.

W. W. Goodrich, for respondents.

Opinion Per Curiam.

Opinion by FREEDMAN, J.; CURTIS, Ch. J., concurred.

Judgment and order affirmed, with costs.

WILLIAM V. BROKAW, ET AL., RESPONDENTS, v. ANNA A. WALTON, APPELLANT.

Before CURTIS, Ch. J., and FREEDMAN, J.

Decided June 18, 1880.

Appeal from an order denying a motion to set aside an inquest, and open a judgment entered thereon.

G. B. Ely, for appellant.

G. H. Crawford, for respondents.

PER CURIAM.—Upon the whole case no sufficient reason appears which calls for a reversal.

The order should be affirmed, with casts.

FRANCIS BROWN, ET AL., v. GEORGE S. GUNNISON.

Before CURTIS, Ch. J., and SEDGWICK and FREEDMAN, JJ.

Decided June 18, 1880.

Motion by defendant for leave to appeal to the court of appeals.

Thomas F. Byrne, for the motion.

C. E. Tracy, opposed.

PER CURIAM.—The papers submitted upon the defendant's application for leave to appeal to the

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court of appeals, fail to show that a question of law is involved, which ought to be reviewed by the court of appeals.

LORENZO THOMASSELLI, APPELLANT, *v.* MARIETTA R. STEVENS, RESPONDENT.

Before CURTIS, Ch. J., and SEDGWICK, J.

Decided June 18, 1880.

Appeal from judgment.

Wm. G. Peckham, Jr., for appellant.

Julius J. Lyons, attorney, and *John Berry*, of counsel, for respondent.

PER CURIAM.—Judgment affirmed, with costs.

EDWARD P. FURLONG, APPELLANT, *v.* ROBERT GAIR, ET AL., RESPONDENTS.

Pleading—false representations, how alleged—failure to allege properly, when waived.

Before CURTIS, Ch. J., SEDGWICK and FREEDMAN, JJ.

Appeal from judgment entered upon the report of a referee in favor of the defendants.

The court, at General Term, after consideration of the facts, and of findings of the referee thereon, said: "As to the alleged falsity of plaintiff's representations, the only charge made in the answer in this respect occurs in the counter-claim, wherein defendants aver that by reason of plaintiff's '*said false representations*' they suffered damage, &c. This averment refers to certain representations set forth in a preceding defense, but the said representations were not then and there, nor are they in any other part of the answer, described as having been false. If, therefore, the testimony given

upon the trial in support of the theory involving the falsity of the representations as the foundation of the counter-claim, had been duly objected and excepted to, the finding of the referee that they were false, and that, by reason of such false representations, the defendants suffered damage in the sum of $142.46, could not be sustained in the present state of the pleadings. The testimony came in, however, without objection; and the question of falsity seems to have been litigated upon it as though the issue had been fully made by the pleadings. Under these circumstances the review to be made, if any were necessary, would have to be confined to the sufficiency of the evidence. But this has been rendered unnecessary by the finding that the contract, as found, was terminated by notice. Upon such termination, the defendants became entitled to an accounting; and in the course of that the sum of $142.46 is to be allowed to them for advances and expenses in excess of profits, even if they should not be entitled to recover it as damages for false representations. The question of falsity is not one, therefore, which affects the result, so far as the amount is concerned."

Truman H. Baldwin, attorney, and *Charles W. Hassler*, of counsel, for appellant.

Arthur, Phelps, Knevals & Ransom, for respondents.

Opinion by FREEDMAN, J.; SEDGWICK, Ch. J., concurred.

Judgment modified by deducting therefrom $269.83 erroneously allowed defendants for profits subsequent to their rescission of the contract with plaintiff, and by making recovery of defendants dependent upon a reassignment of their interest in the patents, and, as thus modified, affirmed, without costs to either party on this appeal.

Statement of the Case.

EDWIN WILEY, APPELLANT, *v.* ANTHONY ARNOUX, ET AL., RESPONDENTS.

Security for costs by non-resident—Code Civil Procedure not applicable to order for, made before its passage.

Before SPEIR and RUSSELL, JJ.

Decided November 22, 1880.

Appeal from an order directing the plaintiff to file security for costs.

The plaintiff is a resident of Brooklyn. The order appealed from was made April 13, 1880.

The court at General Term said: "In the case of Lewis *v.* Farrell,* decided at this term of the court, it was held that before the additional chapters of the new Code went into operation, it was necessary for a plaintiff residing in another county bringing an action in this court, to file security for costs, but that the Code, as amended, had changed the law on this subject. The order appealed from was made before the change in the law occurred. It was correct as the law then was, and should be affirmed."

Herbert K. Cruikshank, for appellant.

John A. Foster, for respondents.

Opinion by RUSSELL, J.; SPEIR, J., concurred.

Order affirmed, with costs and disbursements.

DAVID HARRISON, ET AL., APPELLANTS, *v.* HENRY NEWMAN AND BERNARD REILLY, AS SHERIFF, &C., RESPONDENTS.

Before SEDGWICK, Ch. J., SPEIR and RUSSELL, JJ.

Decided November 22, 1880.

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* *Ante*, p. 358.

Statement of the Case.

This is an appeal from a judgment for the defendants entered upon the verdict of a jury, from an order denying a new trial, and from an order for an allowance.

The case involved mainly questions of fact.

McDaniel & Souther, attorneys, and *Everitt P. Wheeler*, of counsel, for appellants.

Vanderpoel, Green & Cuming, attorneys, and *Almon Goodwin*, of counsel, for respondent Reilly.

George W. Galinger, attorney, for respondent Newman.

PER CURIAM.—Judgment and order appealed from affirmed, with costs.

WILLIAM B. NEWBERRY, ET AL., APPELLANTS, *v.* MICHAEL W. WALL, RESPONDENT.

Before SEDGWICK, Ch. J., SPEIR and RUSSELL, JJ.

Decided December 22, 1880.

This is an appeal from a judgment entered upon a dismissal of the complaint at the trial term. The cause had been tried once before, and is reported in 35 *Super. Ct.* 106. At that trial the case was also dismissed. The general term affirmed the court below, and from that decision the plaintiffs appealed to the court of appeals, where the judgment was affirmed (65 *N. Y.* 484).

Henry Whittaker, attorney, and *F. R. Coudert*, of counsel, for appellant.

Huntley & Bowen, for respondent.

PER CURIAM.—Judgment affirmed, with costs.

Statement of the Case.

MIGUEL DE ALDAMA, APPELLANT, v. FRANCIS F. LASALA, RESPONDENT.

Before SEDGWICK, Ch. J., SPEIR and RUSSELL, JJ.

Decided November 22, 1880.

This is an appeal from a judgment, entered upon the report of a referee, in favor of the defendant, and involves only questions of fact.

Horace Secor, Jr., for appellant.

Starr & Hooker, for respondent.

PER CURIAM.—Judgment affirmed, with costs.

JOHN CAWLEY v. EUGENE KETELTAS, ET AL., EXRS., &C.

Before SEDGWICK, Ch. J., and RUSSELL, J.

Decided November 22, 1880.

Verdict directed for plaintiff, exceptions to be heard in the first instance at general term.

Kelly & Macrae, for plaintiff.

Henry W. Clark and *Richard W. Stevenson*, for defendants.

PER CURIAM.—Judgment reversed, with costs of appeal to appellant to abide event.

AMES H. CHAMBERS, APPELLANT, v. WILLIAM A. APPLETON, ET AL., RESPONDENTS.

Before SEDGWICK, Ch. J., and RUSSELL, J.

Decided November 22, 1880.

Appeal by plaintiff from order of reference.

Statement of the Case.

Wm. W. Badger, attorney, and *Wm. R. Beach*, of counsel, for appellants.

Douglas Campbell, for respondent.

PER CURIAM.—Order affirmed, with ten dollars costs and disbursements.

PATRICK SHEAHAN, APPELLANT, *v.* THE NATIONAL S. S. Co., RESPONDENT.

Before SEDGWICK, Ch. J., SPEIR and RUSSELL, JJ.

Decided December 6, 1880.

Appeal from judgment in favor of defendant, entered on report of referee.

The case involves only questions of fact.

D. & T. McMahon, for appellant.

John Chetwood, for respondent.

SEDGWICK, Ch. J., wrote for affirmance, with costs; SPEIR and RUSSELL, JJ., concurred.

GEORGE W. WELD, ET AL., RESPONDENTS, *v.* BERNARD REILLY, SHERIFF, &C., APPELLANT.

Before SEDGWICK, Ch. J., and SPEIR and FREEDMAN, JJ.

Decided December 6, 1880.

Appeal from judgment and order denying motion for new trial on the minutes.

Vanderpoel, Green & Cuming, attorneys, and *John Yard* and *Almon Goodwin*, of counsel, for appellant.

Stickney & Shepard, for respondents.

SPEIR, J., wrote for reversal of judgment and order, with costs; SEDGWICK, Ch. J., concurred in result.

Statement of the Case.

COMPTON, RESPONDENT, *v.* COMPTON, APPELLANT.

Calendar practice—divorce.

Before SEDGWICK, Ch. J., and SPEIR, J.

Decided December 6, 1880.

In this action for the dissolution of the marriage contract on the ground of adultery, the cause was noticed for the special term and was put on the calendar for trial. When the case was called in its order upon the calendar, an application by the defendant was made to have the issues of adultery tried by a jury. The court granted the order under section 970 of the Code, and specified the issues to be tried. The order was made on the 18th of October, and directed that the cause be set down for trial on the 25th of October, upon the day calendar of that day, in part 3, trial term, of this court, without further application.

The appeal is from that part of the order fixing the time and place for trial.

The court, at General Term, said: "The order having been made by the court after the issues had been settled and the case on the calendar by notice, the court, we think, was invested with full authority for the trial of the cause. The disposition of the whole case was placed in the discretion and judgment of the trial judge, who had it in his power, at the time when the cause was called, to hear the issues of law either before or after the issues of fact had been determined, depending upon the situation and convenience of the parties. The case of Leslie *v.* Leslie (11 *Abb. Pr. N. S.* 311), is not in point, as no issues had been settled when the motion there was made to put the case on the calendar for trial."

Richard S. Newcombe, attorney, and *Albert Cardozo*, of counsel, for appellant.

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Maclay & Mudge, attorneys, and *Wm. A. Beach*, of counsel, for respondent.

Opinion by SPEIR, J.; SEDGWICK, Ch. J., concurred.

Order affirmed, with $10 costs.

ADOLPH QUETTING, APPELLANT, *v.* THE DRY DOCK, &c., R. R. CO., RESPONDENT.

Before SEDGWICK, Ch. J., SPEIR and RUSSELL, JJ.

Decided December 6, 1880.

Appeal from a judgment entered upon a verdict of the jury, and from an order denying a motion for a new trial on the minutes.

A. H. Stoiber, attorney, and *T. H. Smith*, of counsel, for appellant.

Robinson & Scribner, for respondent.

PER CURIAM.—We see no ground, upon an examination of the evidence and the exceptions in this case, for interference with the verdict of the jury.

The judgment and the order appealed from must be affirmed, with costs.

ABRAHAM DE BEVOISE, ET AL., RESPONDENTS, *v.* THE PROVIDENCE & STONINGTON S. S. Co., APPELLANT.

Before SEDGWICK, Ch. J., SPEIR and RUSSELL, JJ.

Decided December 6, 1880.

Appeal from judgment and from order denying motion for new trial on the minutes.

Opinion Per Curiam.

Wm. P. Dixon, attorney, and *Wheeler H. Peckham*, of counsel, for appellant.

Edwin Kempton, for respondent.

PER CURIAM.—We find that no errors were committed on the trial, and that the verdict is fully sustained by the evidence.

The judgment and order appealed from is affirmed, with costs.

THE LATE

CHIEF-JUSTICE CURTIS.

At a General Term of the Superior Court of the city of New York, held at the Court-house in the city of New York, on October 26, 1880.

Present:—Honorable JOHN SEDGWICK, Ch. J., HOOPER C. VAN VORST, GILBERT M. SPEIR, JOHN J. FREEDMAN, HORACE RUSSELL, JJ.

The court met relative to the death of the late Chief-Justice, WILLIAM E. CURTIS.

Hon. JOHN SEDGWICK, Ch. J., made the following remarks:

WILLIAM E. CURTIS, late Chief Judge of the Superior Court of the city of New York, died on July 6, A. D. 1880. He was born in Watertown, Litchfield county, in the State of Connecticut, on September 29, A. D. 1823. He became a judge of the court on January 1, A. D. 1872. The tenor of his life had been a happy preparation for that office. He was graduated at Washington College, now Trinity College, in Hartford, in July, 1843. The liberal studies he began there were continued by him, and through all his years gave him pleasure and elevation of thought. His experiences had been unusually varied and enlightening. The bias of his temperament turned him to the duties of life. He had not avoided any of them, and his performance of them had made him practically effective in his efforts. He had been an active member of

religious, academical, business, and social incorporations. He had given great and cordial attention to the common school system of this city, and had been a member and President of the Board of Education. It had been his habit to meet fully his obligations as a citizen to the State and to the Nation. In many travels, though this country and Europe, he had scrutinized men and their customs, social and political; he therefore understood, in a broad and wise way, those local or national peculiarities which often excite surprise or prejudice. He began his professional career with the late Mr. William Curtis Noyes, so distinguished for his legal learning. His success at the bar had been such, that, for many years before he was a judge, his large clientage had required his advice in most of the branches of the law, but particularly in the laws that regard the mercantile, commercial and manufacturing affairs of this country. His character had attracted the confidence of many persons who were not clients, and who wished to be guided by him in their personal concerns or the management of their property. He was moderate in his disposition and sagacious in mind. These qualities ruled his actions, and were manifested, even when his sensibility, which was great for a man of his career, had been aroused by circumstances. The methods he used were exact and systematic. The dignity of his bearing and his polished manners were not more conspicuous than his kindness, which gave to those who addressed him a right to his attention. Above all things else, an unreserved obedience to his duties, love of truth, and honor without spot, had directed his ways.

With this character and these acquirements he became a judge, and they set their stamp upon his judicial acts. As the ever to be venerated Hale resolved and acted, he too did justice, "uprightly, deliberately and resolutely." Forms were not ignored, and he comprehended all details, but, passing by small things, he went toward and reached the substance of the facts and the reason of the law. His nature did not allow him to forget that the law he was to administer had been built upon the conduct of men, in their practical relation; and that the people, not knowing the law in the shape of general proposition, were in great part guided

by custom and the indications of special circumstances. It was his pleasure, however, to perceive what was common to the conscience and knowledge of men generally, and what were the necessities of all societies, and upon them to form the rule, rather than upon the customs of limited trades or of particular communities. He was reluctant to look for the law of the land in his opinion as an individual. The convenience of the bar in their practice was constantly remembered by him. He was not wholly absorbed by the more intellectual or the public exercises of his official functions. He gave minute and scrupulous attention to the lesser duties, which are not open to public inspection.

At the harmonious close of his life in the room where he was born, after bidding farewell, with calm and serene mind, to his family one by one, he died in religious faith and hope. His body was laid in the earth, near his father's body, in the sunshine of an unclouded summer day.

From the day of his becoming a judge to his last day—even to his last hours—he used all his faculties, and did his utmost to fill his office faithfully and wisely. For this and its results, the court perpetuates an expression of its respect and reverence, as great as may be due to such a man.

On motion—adjourned *sine die*.

At General Term, March 11, 1881.

Before SEDGWICK, Ch. J., and FREEDMAN and TRUAX, JJ.

Mr. Lewis L. Delafield arose and addressed the court as follows:

May it please the court:

I am charged by the bar with the duty of presenting to this court the record of the proceedings of the meeting of the bar, held in memory of the late Chief-Justice CURTIS.

I lay this record upon your Honor's bench as the last

tribute of the bar to a good and learned judge, and in doing so it is my duty, as my pleasure, to move that the record of our proceedings be entered in full upon the minutes of this court, and that it be furnished to the reporters of the court to be included in the next volume of its reports.

Chief-Justice SEDGWICK, in granting the motion, said:

Such proceedings have been already had in this court that it would be inappropriate to say more, on this occasion, than that the motion is granted, and the clerk be directed to carry it into effect.

MINUTES of a meeting of the bar, held in the general term room of the supreme court in the city of New York, on the 26th day of October, 1880, *in memory of William E. Curtis, deceased, chief justice of the superior court.*

Mr. Lewis L. Delafield called the meeting to order, and nominated, as presiding officer, the Hon. NOAH DAVIS, Chief-Justice of the Supreme Court.

Mr. Delafield nominated as vice-presidents:

Hon. JOHN SEDGWICK, Chief Judge of the Superior Court.
Hon. CHARLES P. DALY, Chief Judge of the Court of Common Pleas.
Hon. SAMUEL BLATCHFORD, Judge U. S. District Court.
Hon. DELANO C. CALVIN, Surrogate.
Hon. FREDERICK SMYTH, Recorder.
HON. H. A. GILDERSLEEVE, City Judge.
Hon. JOHN M. BARBOUR, late Chief-Justice of the Superior Court.

Mr. Brainerd nominated as secretaries:

Mr. CLIFFORD A. HAND.
Mr. JOHN L. CADWALADER.
Mr. JOHN McL. NASH.

Mr. Charles Tracy offered the following resolution, which was unanimously adopted.

Resolved, That the Hon. WILLIAM E. CURTIS, during his practice at the Bar in this city for more than twenty-five years, and his service for the last eight years on the bench of the Superior Court, of which he was chief judge since October, 1876, by his ability, learning, integrity and courtesy gained our strong respect and esteem; and we share largely in the public sorrow caused by his death. His balanced mind and calm temper bore the labors and cares, sometimes perplexing, of the judicial office, with patience, impartiality and dignity; and in private life, his pure character, high principles, varied attainments and true refinement and modesty made him attractive as a companion and personal friend. It is a grateful, though sad duty, as he passes from among us, thus to record our appreciation of his public and private worth."

The following gentlemen addressed the meeting in seconding the resolution:

Judge VAN VORST, in speaking to the resolution, said:

Mr. President and Gentlemen of the Bar:

It is eminently fitting that the death of a good judge should not be allowed to pass without appropriate notice and action by his contemporaries of the bar and bench. The memory of those who have well filled their part in the administration of justice, and in the responsible and useful places of life, should be dearly cherished and sedulously preserved.

I have yielded to the wishes of my brethren in the court over which Judge CURTIS lately presided, in appearing to-day to speak of its appreciation of his excellent character, and qualities as a citizen and a judge, and to express its sense of the great loss it has sustained in his death.

It was in the early days of July last that we were first startled with the intelligence of his sudden and severe illness, too soon followed with the news of his death. A

few hours only before hearing of his death, in a communication written by his own hand, his associates were advised that he expected to be in his place on the bench to assume its duties at an hour named. But a rapid and fatal change in his illness defeated his intention, and left his place vacant. Suddenly "the silver cord was loosed, and the golden bowl was broken," and a good judge left us, "to receive a just reward of his integrity from the Judge of judges, at the great assize of the world."

Chief-Justice CURTIS was born in Litchfield county, Connecticut, in September, 1823. He was descended from worthy ancestors, who came to this country as early as the year 1632, and settled Stratford, Connecticut. His ancestry was notable. The family from which he sprang is justly honored in the State of his birth, by a record of excellent service in public affairs. Members of it have left the impress of their character upon the laws which they aided in framing and expounding. Among them are to be found both legislators and judges, whose lives reach back to the early days in our national history. His grandfather represented Connecticut in Congress towards the close of the last century, and was for many years one of the judges of the Supreme Court of Errors in that State, and his great-grandfather, Benjamin Paine, in colonial days, sat with the Governor in the High Court of Appeals in the colony of Connecticut. His father, Holbrook Curtis, was a sound lawyer, and was held in the highest esteem as a man, in the county in which he lived. It is stated that he moved to Watertown, where he afterwards died, at the request of its town people, who sought to have the influence of his good life and judicious counsel in their midst. This I regard the greatest mark of confidence which could have been paid him by any peoples. He, too, in the end, attained to judicial station in the community which demanded his services. The traditions and spirit of such preceding lives must needs leave their indelible mark upon those who spring from them; and WILLIAM E. CURTIS was truly loyal to the good name and report of his ancestors, and has left in the record of his own life, no act to mar the fairness of his family escutcheon.

He was well educated in the broad sense in which that term is used with us. New England has made ample provision in its schools, academies and colleges for the education of her children, and in his early days and maturer youth he had the largest opportunity for academic and collegiate training and culture. He was graduated at Trinity College, Connecticut. But his education did not end with his college days, nor did he, on receiving his diploma, lay aside his books. He was always a thoughtful student. His aim appeared to have been to thoroughly educate himself for a life of extended usefulness in every walk and relation; so that he was not only a good Latin scholar, and familiar with the Greek, but he also acquired a familiar knowledge of the French, Spanish and other modern languages.

As it was his intention, early formed, to study and practice the profession of the law in the city of New York, he knew well enough how serviceable to him and others, with whom in the prosecution of a commercial practice he might be brought in communication, would be a familiar knowledge of the modern languages, and I am sure that in the end he was not mistaken in this conclusion. He studied law in this city with that admirable and highly-gifted lawyer and advocate, William Curtis Noyes, and was admitted to the practice of the profession in the year 1846.

One cannot speak too warmly of his character as a counselor in his profession and as an advocate. His practice was large not only in the State, but in the Federal Courts, and all who had business relations with him, lawyers and clients, individuals and corporations, bear uniform testimony to the fairness of his dealings, and to his intelligent and upright conduct on all occasions. He seemed to have an intuitive idea of right and justice, from which he never swerved. He was a safe guardian of every interest committed to his management, and allowed no selfish purpose to swerve him from entire justice to others. This sentiment was carried in instances to self-sacrifice. He was a large-minded man, and the current of his thoughts and actions was limited by no narrow bounds; it deepened and widened, according to the subject he was called upon to consider.

But although he was actively engaged in the practice of the law, and never slighted the demands it made upon his time and thoughts, he was not unmindful of other claims and interests, outside of his profession. He was the head of a large household, well managed and ordered. The affairs of his family were near his heart and were affectionately and wisely adjusted. He was a tender husband and a kind and considerate father. He took, as one would well suppose he might, a deep interest in the cause of common school education, and was for several years a commissioner of education, and finally became the president of its board, and kept up until the last his concern for the system. He quite well understood the duty of the State with regard to the education of its youth, and the caution needed in wisely administering the system, so that the true end should be reached,—the formation of an intelligent and upright citizenship.

And when, after a considerable practice of his profession, he had reached an age and gained an experience which fitted him for the station, the advocate with an unblemished record was advanced by the choice of the community, and with the approval of the bar, to be a Judge of the Superior Court. This office he had held at the time of his death for a period of eight years and upwards.

The volumes of the reports of the court, of which, in the end, he came to be Chief Justice, contain the opinions and judgments pronounced by him in many important controversies, and exhibit the truly judicial training and cast of his mind, and bring out in clear relief the sound sense, the clear intelligence, and the prevailing love of justice and equity which always influenced his judgment. No technical quibbles, no refinement of casuistry could break into the notions of right and wrong which his own common sense suggested to him.

Most of you who are now present, and who have often appeared before him, have observed his dignified and courteous deportment on the bench, as well as the ever-present patience and considerate attention which characterized him when he presided at trials. He never ceased to be the true

gentleman. Not only counsel engaged, young and old, but parties, witnesses, and jurymen shared the quieting influence of his conduct and bearing as a judge. In the causes tried before him on the equity side of the court, which often demand consideration, and on appeals to the general term, he was always prompt in rendering his decisions. This proceeded from his thorough training and business habits, strengthened by the conviction that tardy justice was often its virtual denial. In his consultations with his brethren, he was always ready at the appointed time with his opinions. I have rarely known of an instance of failure in this regard. He was always prepared to give a respectful consideration to dissenting views. He would not cling tenaciously or unreasonably to a conclusion which he had reached. In the presence of a sounder and better view, he would yield. His judicial office and duties always received his first attention, and although interested in other concerns, he never allowed them to interfere with his obligations to the courts.

I have said that even during his judicial term, interests of moment engaged him. Societies and associations, literary, social, scientific and benevolent, all held an appropriate place in his regard, and their claims were acknowledged and satisfied.

Now, such a character as we find developed in Judge Curtis would still be incomplete without a religious element, and this prevailed in him to a large degree. But although his faith was clear and distinct, and according to the traditions of his ancestors, yet it was broad, and made no approach to bigotry.

His ideas were catholic. He was charitable in his judgments of others, and even respected their honest opinions as to questions subjective or objective. He lived and died in the faith of his fathers; and from his father's house, which he had inherited, surrounded by its lawns and trees, in the beautiful village of Watertown, and which he so much loved, and to which he always gladly went when the summer vacation arrived, his remains, surrounded by a sorrowing family, were borne by the townspeople to the church on the adjoining square.

This church was well filled on that bright summer morning with the people of the place, many of whom had known him in his early life, and looked upon his career of usefulness and honor in this metropolis with interest and pride, and who had come to take a last farewell of him on earth, and to accompany the casket which contains his remains to its quiet resting-place in the neighboring cemetery.

He died, and was buried, as we may well consider he could have desired.

The late Chief Justice of the Court of Appeals, at the summons of the angel of death, left the judicial work upon which he was at the moment engaged. The lamented HAMILTON W. ROBINSON, that experienced jurist, whom we all so greatly loved, walked feebly from the judicial seat, which he had adorned, to the chamber of sickness, never to return here; and Chief Justice MONELL, in the midst of the exalted duties of judicial station, died in the completeness of his fame, and at the commencement of a new term to which he had been lately chosen. That summer rest at Watertown to which Judge CURTIS looked forward to fit him for the discharge of duties in the fall, he has exchanged for the unbroken rest which eternity unfolds to the wearied ones of this mortal life.

What can I say more of our departed friend?

His commanding presence, his excellent judgment, his social virtues, his pure conversation, enriched by extensive reading and much observant travel, his sympathetic nature and kind offices, remain with us now only as a memory.

I lay these few leaves, moistened with tears, upon his bier, upon which are written our precious thoughts of him, and the lasting regard in which his memory is held among those who knew him well. There is no foul spot to sully the fair record of his life. It is clear and stainless as the lawn which symbolizes his office. We, upon whom the warm light of his life fell, and who were strengthened by his unfaltering purpose "to do justly, love mercy and walk humbly," may well deplore his death and seek to preserve to others, who come after, for their guidance, comfort and

encouragement, the record of a good and a true life, as a man, an advocate and a judge.

Mr. Henry J. Scudder delivered a memorial address on the death of chief- justice Curtis.

Mr. Chairman:

I venture a few words in addition to the beautiful tribute Judge VAN VORST has offered to the memory of the friend we have met to honor and to mourn.

I had hoped to present on this occasion something more extended, and perhaps more pertinent than my strength allows at the moment. A temporary malady unfits me for speaking at length, and compels me to limit my remarks, so that much I had desired to say in behalf of a friend with whom I held an exceptionally intimate relation for thirty odd years, must remain unsaid.

This close relation was warmed into friendship by frequent intercourse, and possibly strengthened by ties in the nature of kinship that sprung up a few years after our original acquaintance.

Few, perhaps none, here knew Chief-Justice CURTIS so thoroughly, so intimately as I knew him, so well understood his general nature and habits, his noble and generous qualities, and hence in some sense I felt it a personal duty to present him to you and to the bar more fully than I find myself able to do. This, however, has been most appropriately done by Judge VAN VORST.

My acquaintance with Chief-Justice CURTIS began when I was in my undergraduate course in Trinity College, of which he was an alumnus. He had closed his preliminary legal studies, and been admitted to practice, before I first met him.

He entered college with most thorough preparations, due largely to the intelligent care of finely educated parents. If we look to birthright for distinction we will assuredly find no family line of greater worth, power, or connection than that from which our friend descended. His childhood and youth were passed in an atmosphere of refinement and cul-

ture. His college reputation was that of a superior scholar and advanced thinker. Gifted with unusually fine taste, and exquisitely susceptible to the beautiful and harmonious, he naturally addressed himself to polite literature in the classics, and Greek, with its elegancies of formation and expression, was at this time his favorite study. Modern languages early engaged his attention. He was familiar with the great authors of Italy, France and Spain, and when fatigued by professional or judicial labors, he found recreation in their works.

With these tendencies to liberal taste we may look for his earnest participation in all æsthetic movements. He hastened to contribute to the advancement of art and literature in all their varied forms, and in accordance with this disposition, early took membership in the prominent societies and organizations of the city designed for their development. Under the same impulse he devoted several years to the cause of practical education in the schools of the city; years, too, when his professional labor was intense, and the volume of his engagements exceedingly large.

With these generous attributes he could not be a technical practitioner. He depended always upon principle rather than case, and solved his legal questions by analysis instead of illustration. A sound reason had more weight with him than a dozen cases scantily covering the one under consideration.

His practice was large and exceedingly lucrative. It presented, however, but few ostentatious features. His refined and meditative temperament could illy brook the jangle of a jury trial, and he found more pleasure in framing a compromise of disputes than achieving a triumph through the verdict of a jury acting upon conjecture or prejudice.

In business affairs he was singularly methodical and precise. He instinctively abhorred irregularity. Member of an eminent political party, and wedded to its great cardinal principles, he witnessed the local abuses of some of its leaders with indignation, and addressed himself with intense ardor to their correction.

Judicial honors had been tendered to him, but declined. When, however, the great reform movement swept its purify-

ing stream through the various channels of the city government, he yielded to the demands of its leaders and ascended the bench. Every fiber of his being thrilled in sympathy with that movement, and no one who witnessed his labors in aid of reform can forget the surpassing energy he gave to the cause.

His judicial career was marked by exceptional prudence, wisdom and kindness. He carried to the bench the simple dignity of the fireside,—he needed no more. No one ever dreamed of invading the proprieties of his position, no one ever thought to secure success by operating upon his prejudices, for he was without prejudice.

Justice needed no mythical blindfolding when he worshiped at her shrine. His courtesy was a natural grace. He was absolutely free from the presumptuousness that conceives the ability to compass all the principles of a complicated case upon the mere opening of counsel, and confuses reason by crude interruptions. He listened patiently and deliberated carefully.

There was one marked aspect of his character that may appropriately be presented to this assemblage. He was possessed of a thorough Christian faith, and early became a member of the Episcopal Church, and one of its most earnest supporters. A resolution of the wardens and vestry of St. George's church in this city, where he was a worshiper for nearly twenty years, portrays something of the esteem in which he was borne. I shall ask my friend Mr. Vanderpoel to read it, as my voice reminds me to abridge my observations.

Mr. Chairman, in this connection I am permitted to draw aside the vail from a spectacle alike impressive and instructive, Our friend was conscious of his impending fate. Death came to him without a shadow of disquiet. He serenely witnessed its approach, and as the supreme hour drew on him gathered in the loved ones of his family, his wife, the most devoted of her sex, his children, fond and intelligent, and asked the beautiful services provided by the Church for the comfort of those about to part from its earthly ministrations; and, even as the last response fell audibly from his weakening lips upon the ears of this mourning group, his

spirit passed over the dark stream to the echoless shore, there to be made perfect with kindred spirits.

The autumn brings you, sir, and your associates, to the activities of your high positions. In the discharge of your duties you will have frequent occasion to think of your late friend and brother. Your thoughts will turn to the distant country grave over which the dull leaves of October are thickly gathering, and so turning and dwelling upon him who lies there, you will pay him the homage of love for his worth honor for his virtues, and thus will you keep his memory green.

Mr. Aaron J. Vanderpoel next addressed the meeting. and, in the course of his remarks, said:

Four years since, you presided at the meeting of the Bar convened on the occasion of the death of Chief-Justice MONELL. Judge CURTIS met with us, and was assigned by his brother members of the court to express their sorrow in their bereavement. The aptness and beauty of his address on that occasion was striking. It was a just tribute to one whom your Honor then characterized as "a man who worthily bore the great honors he worthily enjoyed," a sentiment which applies equally well to his successor.

Remarks made by *E. W. Stoughton.*

We have met together to pay to the memory of our departed brother, Judge CURTIS, that tribute of respect and affection which in his lifetime he had so well earned. I knew him well. He was one of my most intimate—one of my dearest—friends. I knew him from the time he commenced his professional career until his life terminated as chief judge of one of our highest courts. At the bar I was associated with him as counsel in several important causes, both in the courts of this State and in the Supreme Court at Washington. I know how faithfully he ever discharged his professional duties. He was not in the ordinary sense an eloquent advocate, but he possessed those solid qualities which, united to

untiring industry and much learning, made him a safe adviser and an invaluable associate. In the investigation of a cause he toiled earnestly, examining both sides, and every question he thought could possibly arise upon trial or argument. So thorough was his scrutiny, that he was rarely if ever surprised by a new or unexpected point raised by his adversary. He was extremely patient of study, and mastered the facts of a complicated case with rare ability. His mind was so well balanced, his sense of justice so strong, that the results he reached were usually in harmony with right, and hence the in which he advised litigation seldom terminated adv to his opinion.

was nominated for the bench at a time when party lines t rigidly drawn in this city. The people of character responsibility desired—as they ever do—the best of our profession for the judicial office, and he was selected as one eminently fit to administer justice among men. I happen to know that he did not expect the nomination, and felt by no means certain of his election. He was, and ever had been, an earnest and consistent Democrat, but was not the favorite of faction. He, however, commanded the votes of honest, intelligent men, without distinction of party, and, fortunately for the public, was elected. How he has administered the duties of the bench we all know. He possessed all the learning needful for that purpose. His mind was eminently judicial. He was by nature fitted to

> "Poise the cause in justice' equal scales,
> Whose beam stands sure, whose rightful cause prevails."

His judicial career, although not long, was full of usefulness. He ever brought to the consideration of the causes he was to decide impartiality, ability, learning, and the most thorough study. He did not reach conclusions by rapid strides, but by slow and careful preparation, and when he declared the result, we knew he had devoted to the case his best energies, and all the time and labor which the most conscientious sense of duty imposed. I have never heard—I doubt if any member of the bar ever made—an unkind criticism upon the

judicial conduct of our departed friend. All who knew him respected him, and many entertained for him a personal affection. His manner and bearing upon the bench were kind and courteous to all, and its dignity was never by him forgotten or laid aside. He was, I believe, a favorite with the younger members of the bar, whose good opinion, whose esteem, I deem of great value to the judge, who should ever remember that the least kindness extended to them they never forget, whilst an unkind or harsh remark from the bench inflicts upon them a wound slow to heal.

It would not be profitable, nor would it aid in illustrating the intellect, attainments, or character of our departed brother, to refer particularly to his services at the bar or upon the bench. All he has done—all his professional, all his judicial labors, have been honorable, and reflect honor upon his memory. Justly may it be said of him, "Well done, good and faithful servant." His public career has been unsullied; his private life, upon which his friends love to dwell, spotless and pure.

His was a singularly harmonious character. All the qualities which unite to form the truest, the most interesting and cherished of friends he possessed. In social intercourse he rarely spoke or thought of himself, but was absorbed in the purpose of making those about him happy. Naturally refined, he had cultivated a taste for the best literature—the noblest works of nature and of art. To those who casually saw him—who knew him not—he was undemonstrative, and apparently not disposed to be interested in what was passing; but when in conversation with friends, this outward seeming disappeared, and he often surprised them by the breadth and depth of his intelligence, by his varied knowledge, and by the thought he had given to subjects far outside the range of ordinary information. He possessed the rare faculty I have often observed in him, of adapting himself with great facility to the old, to the young, and to the foreigner first visiting our country, and of making himself interesting and instructive to them all. He was, indeed, a general favorite in social life—not because he sought to be so, but because he was so genial, so kind of heart, so cultivated and full of knowledge

that none could be much with him without a desire to meet him again. So close to me in friendship was he, that life here in the future will not be quite what it was when he lived. Every dear friend we possess adds a charm to existence, and when one passes away forever, the loss is irreparable.

Judge CURTIS was a firm believer in Christianity—a worshipper of the God of our fathers. He was a student of modern learning, but he had the wisdom to interpret it in harmony with divine revelation and the divine commands. He died in the faith taught him in his youth—that which he and the wife he so dearly loved had taught their children. He died peacefully, in the home of his fathers, amid the everlasting hills of New England; and as he looked for the last time upon the earth it wore its richest summer attire—was clad in its most gorgeous apparel, and was crowned with a wreath of flowers. He died in the arms of her who mourns and will ever mourn his loss, surrounded by children in whose loving memory he will ever be cherished and honored. We could not have wished for him a more useful—a happier life, although we mourn that it could not have been prolonged. He will never more come to us, but may we all live in the well-founded hope that we shall go to him.

John E. Parsons, Esq., offered the following resolution, which was carried:

Resolved, That a copy of the resolutions be furnished to the family of the late Chief-Justice CURTIS, and that a record of the proceedings of this meeting be presented to the General Term of the Superior Court, with the request that it be entered upon the minutes of that court.

LEWIS L. DELAFIELD,
CHARLES TRACY,
JOHN E. PARSONS,
CEPHAS BRAINERD,
JULIEN T. DAVIES,
} *Committee of Arrangements.*

The meeting then adjourned.

INDEX.

ACCOUNTING.

1. Where an action is brought for an accounting, and judgment is rendered, dismissing the complaint on the ground that there has been an accounting by the defendant, which is binding and conclusive on the plaintiff, and adjudges that defendant recover for the amount found due him on such accounting, the effect of a reversal of such judgment is that upon these facts appearing upon the trial, the plaintiff is entitled to an accounting, and to the payment of such sum as on such accounting he may be found entitled to. *Rust* v. *Hausell*, 22.
2. If in such case defendant stipulates and appeals to the court of appeals from reversal at general term, and that court affirms the decision of the general term and orders judgment absolute for the plaintiff on the stipulation, with costs, such order is a final determination that plaintiff is entitled to an accounting, and to the costs of the action. Defendant is not entitled to tax costs; and referee's fees paid by defendant upon taking up the referee's report, made upon a reference ordered in and by the order, ordering, pursuant to the judgment of court of appeals, judgment absolute for plaintiff against the defendant, with costs, cannot be taxed by defendant as a disbursement. Defendant cannot enter judgment for balance found due him on such reference. *Ib.*
3. In an action for an accounting, after filing the referee's report, plaintiff moved for interlocutory judgment and an order was entered which "adjudged and decreed that it be referred to the same referee to take and state an account," &c., and proceeded to specify in detail the manner in which the accounting should be had. *Held*, that the court below did not exceed its power by "ordering more than a simple judgment that defendant account." *It seems*, that so far as the rights of plaintiff are concerned, the above form of judgment is not an adjudication that the reference is to proceed because the defendant is liable to account. Whether the said judgment might have been entered by the clerk, *quære*. *Hathaway* v. *Russell*, 103.
4. Upon the facts, *held*, that the interlocutory judgment should be affirmed, and the accounting directed by it should proceed. *Ib.*

Assignee for benefit of creditors who received assets must account to creditors, though his assignor has since been discharged in bankruptcy from the debts secured. See *Smith* v. *Tighe*, 270.

Accounting may be had as between partners, though complaint fails to show existence of debts due to or from the firm. See *Kuehnemundt* v. *Haar*, 188.

ACTIONS.

1. Actions are local when their cause is in its nature local, and transitory when the transactions on which they are founded might have taken place anywhere. The distinction in no way depends on the character of the action as being one of common law or equitable jurisdiction. *A. & P. Tel. Co.* v. *B. & O. R. R. Co.*, 377.
2. When the court, acting on the

person, compels a thing to be done (which could be done anywhere), though the doing of the thing might produce effects and results in a state, &c., other that in which the court had jurisdiction, or though the inquiry as to whether the doing of the thing should be compelled or not involves a question as to the title to lands situate in another jurisdiction, the solution of which may even constitute the essential point on which the case depends, the action is not local. *Ib.*

3. So also where the court, acting on the person, enjoins the doing of certain acts in the State in which it has jurisdiction, although such injunction may prevent the doing of certain acts in another State (which could not be directly enjoined against by it), which would otherwise have taken place as resulting from the act enjoined against, the action is not local. *Ib.*

ADMISSIONS.

See DEATH, ACTION FOR CAUSING; EVIDENCE; INSURANCE (LIFE).

ADVERSE POSSESSION.

1. Adverse possession can commence and run in favor of a grantor, as to either the whole or a part of the granted premises. This, though he has never given the grantee possession. But the evidence to establish it should show a clear, unequivocal and notorious disclaimer of the grantee's title. In this case, *held*, such declaimer. *Sherman* v. *Kane*, 310.
2. Corporation has power to acquire title by adverse possession in protection of an undoubted power to hold the lands in question. *Ib.*
3. Warranty deed does not estop grantor from beginning an adverse possession, and acquiring thereby a title which will not accrue to the benefit of the grantee. This is the rule equally when possession is not given, as when it has been given and there has been a re-entry. *Ib.*
4. Adverse possession necessarily implies that a title has been competently acquired through one or another of the methods of transferring title recognized by law, and which, if relied on by a warrantor, who had not gained title by adverse possession, would inure to the benefit of the covenantee. But where title by adverse possession is relied on, the policy of law forbids an examination of any particular claim, from its conclusive presumptions that there has been some unquestionable claim. *Ib.*

AGENCY.

1. In a purchase of agent's interest in an agency for a term of years, provided principal's consent, if necessary, should be obtained, a condition precedent to recovery of purchase-money is that there should be a valid subsisting contract, whereby the vendor is constituted agent for the term. *Felton* v. *McClure*, 53.
2. An instrument purporting to be a contract between a corporation and third parties, whereby the corporation agrees to and does employ the third parties as its agents for a specified period; but not signed by the president of the corporation, nor attested by its secretary, nor sealed with its corporate seal, and repudiated by the company; the instrument in the case at bar being signed "J. D. Culp, for the Consolidated Tobacco Company of California, by authority as per telegram hereto attached. This to be ratified and properly indorsed by officers of said company," and the telegram being "To J. D. Culp: You are authorized to close contracts for sale of our goods on terms desired, but official documents can follow if needed. I. N. Stow, President Consolidated Tobacco Co., Cal.;" does not constitute a valid, subsisting contract. *Ib.*
3. Consent of the principal to a transfer of the agent's interest under a claimed contract, but providing that the consent was not to assume any recognition by the company of the existence of any such contract, or a similar provision, is not sufficient in above case. *Ib.*

4. A broker employed by his principals to purchase for them, as such broker, from a specified person, a certain commodity, with no authority to purchase in his own name, and who, by reason of his failure to disclose his principals, is personally charged with and pays a judgment for the purchase-price thereof, has no rights against his principals, arising out of said transaction, except those gained upon principles of equity, giving him such claim as the vendor may have against said principals. *Knapp* v. *Simon*, 225.
5. Consequently, a release of all claims arising out of said sale, given by the vendor to one of said principals (Act of 1838, for relief of partners and joint debtors), prior to the commencement of the vendor's action against said broker, furnishes to the party so released a good defense to a subsequent action brought by the broker against his principals, to recover the amount paid by him as above stated. *Ib.*
6. Such action by the broker against his principals, should be brought within six years from the time the vendor's claim accrued. *Ib.*

Insurance company bound by agent's approval of manner of lading. See *Allen* v. *St. Louis Ins. Co.*, 175.

See FACTORS AND BROKERS.

ALIMONY.

See DIVORCE.

AMENDMENTS.

1. Upon the trial, plaintiff moved to amend his complaint to include interest on the demand, and the referee reserved his decision, no objection being made to his so doing. *Held*, that an allowance of the amendment, made in the findings of the referee, was in time. *Bean* v. *Edge*, 455.
2. Where the complaint sets forth a promissory note not purporting to be made by defendants, and various circumstances by reason which it is sought to charge defendants with the payment of the note, but does not allege a promise by defendants or either of them to pay it; the trial court has no power to allow an amendment of the complaint by inserting an allegation of a promise to pay; consequently the General Term can neither deem it to have been made, nor make it itself, so as to make the verdict *secundum allegata*. *Storrs* v. *Flint*, 498.

Injunction, amendment of, under section 723, Code Civ. Proc., by inserting grounds of. See *Atl. & Pac. Tel. Co.* v. *Balt. & O. R. R. Co.*, 377.

Answer, amendment of under section 723, Code Civ. Proc. See *Hennequin* v. *Clews*, 330.

Right of court to allow amendment on trial, when not limited by stipulation that "no other, further or amended answer be served," &c. Ib.

APPEAL.

1. An order denying a motion for judgment for sum claimed to be admitted by answer, sufficiently involves the merits of the action, and affects a substantial right to be the subject of review by the general term. *Marsh* v. *West, &c., Co.*, 8.
2. After an appeal from a final judgment entered upon an interlocutory one (no appeal having previously been taken from the interlocutory judgment) had been dismissed, an appeal was, on December 4, 1879, taken from the interlocutory judgment which had been entered March 14, 1879. On motion this appeal was dismissed. *Cameron* v. *Equitable Ass. Co.*, 84.
3. An appeal is not discontinued as to the respondent, by the service of a notice of withdrawal, accompanied by a tender of costs to date; the order of the court is necessary to accomplish this. The respondent in such case may obtain an order that the appeal be declared abandoned; or he may proceed under General Rule 41, and Rule 4 of this court, if no printed case has been served, and after the appeal has been placed on the calendar, move for a dismissal thereof. *Weinman v. Dilger*, 101.
4. Exceptions contained in a case made and settled may be heard on

appeal to general term from an interlocutory judgment. *Hathaway* v. *Russell*, 103.

5. The defendant appealed from an order referring the issues in the action for trial, and thereafter applied for leave to serve an amended answer, which was granted upon condition that the order of reference stand, and that the issues made by the amended answer be tried thereunder. Thereupon defendant duly entered an order in compliance with said conditions, served an amended answer, and proceeded with the reference. *Held*, that he thereby waived his right of appeal from the order of reference. *Egbert* v. *O'Conner*, 194.
6. Upon an appeal from an order denying a motion to open a default, the general term may, on reversal, direct the entry of such order opening the default as the special term should have granted. *Knauer* v. *Globe Ins. Co.*, 370.
7. In an action for an accounting, judgment was rendered at special term, adjudging that the complaint be dismissed on the ground that an accounting had already been had which was binding and conclusive on the plaintiff, and adjudging that defendant recover the balance found due him on said accounting. Plaintiff appealed to general term, which reversed the judgment and ordered a new trial. Defendant stipulated and appealed to the court of appeals, which affirmed the decision of the general term, and ordered judgment absolute for the plaintiff on the stipulation, with costs. *Held*, such order is a final determination that plaintiff is entitled to an accounting, and to the costs of the action, and that defendant cannot enter judgment for amount found due on the reference ordered by such order, nor can he tax costs and disbursement, *e. g.*, referee's fees on taking up such report. *Rust* v. *Hausell*, 38.

An appeal from order confirming report of referee in reference other than of issues, brings up nothing for review, if no exceptions have been filed. See *Rust* v. *Hauselt*, 22.

Duty of respondent to prepare and file proper judgment roll. See *Knapp* v. *Roche*, 200.

Question of fact, how brought up for review. See *Dart* v. *Gillies*, 560.

ARREST AND BAIL.

If the plaintiff's attorney consent to a postponement of the justification of defendant's sureties on arrest, though for an indefinite time, the sheriff is not liable as bail under § 201, Co. Proc., and has no right to re-arrest the defendant, until an actual default has been made by the sureties. In case of such re-arrest before default, proof of prior notice by the sheriff to the defendant that he would expect the undertaking to be approved of at once by the judge, on justification, or by the plaintiff's attorney, affords no defense to an action for false imprisonment, nor does ignorance of the existence of the stipulation postponing justification constitute a defense. *Arteaga* v. *Conner*, 91.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Where an assignee for benefit of creditors has received assets, it is no defense to an action for an accounting, brought against him by the creditors, to allege that, since the execution of said assignment, the assignor petitioned for and was granted a discharge in bankruptcy from the debts thereby secured. The beneficiaries under the trust created by the assignment, *i. e.*, the creditors, have a vested interest in the assigned property, and its proceeds, to the extent of their respective claims. *Smith* v. *Tighe*, 270.
2. The cause of action for such sums as may have been withdrawn in excess by any of the partners is in the firm, and passes as an asset by the assignment for benefit of creditors. *Kuehnemundt* v. *Haar*, 188.

ATTACHMENT.

Liability of party for conversion of

goods taken under attachment. See *Bean* v. *Edge*, 455; *Day* v. *Bach*, 460.

Attachment, how pleaded as basis of defense for non-payment. See *Marsh* v. *West, &c. Co.*, 8.

ATTORNEY AND CLIENT.

Value of attorney's services may be considered by jury in determining whether he accepted a certain sum as compensation for said services, or for another purpose. See *Robbins* v. *Pultzs*, 184.

BANKRUPTCY.

This action was brought for dissolution of the copartnership between plaintiffs and defendant, and for an accounting; also for damages for inducing plaintiffs by false representations to enter into said copartnership; upon the issue of fraud a verdict was rendered for plaintiffs, and the referee before whom the accounting was had, reported that the amount thereof should be paid out of the individual interest of the defendant in the partnership assets which had been collected and paid into court. Prior to the confirmation of the referee's report, the defendant was adjudged a bankrupt, and two years after entry of final judgment upon the report and payment to plaintiffs thereunder, defendant's assignee petitioned that the judgment be set aside and that he be substituted in place of defendant, and be allowed to come in and defend. It appeared that plaintiffs were ignorant of the proceedings in bankruptcy till after entry of final judgment and payment of the funds thereunder. *Held*, that the prayer of the petition was properly denied; that the relief asked for must be sought in an independent action. *Keck* v. *Werder*, 339.

Effect of discharge in bankruptcy on rights of creditors under prior assignment for benefit of creditors. See *Smith* v. *Tighe*, 270.

Application to open inquest and serve supplemental answer, setting up discharge in bankruptcy, when denied for laches. See *Henderson* v. *Savage*, 221.

See PLEADING.

BARRATRY.

See INSURANCE (MARINE.)

BILL OF PARTICULARS.

Plaintiff having sued defendant, an attorney, for the conversion of a certain draft and the moneys collected thereon, claiming title thereto by assignment from one D., defendant in his answer alleged that the draft was received by him under an agreement with D., by which he was to collect the sum due thereon and credit D. with the net amount collected, on account of moneys which he alleged were due to him from D. for professional services and otherwise, and on account of divers contracts, &c., assumed by him for D. In another subdivision of his answer, he further alleged that said agreement having been carried out, D. had executed and delivered to him a general release of and from all claims. *Held*, that plaintiff was entitled to a bill of particulars of defendant's first defense, notwithstanding the fact that another of the defenses relied on was a general release. *Dicesy* v. *Rust*, 374.

BILLS, NOTES AND CHECKS.

R. held three notes made by one Williams to the order of L., and indorsed L. per Henry White. Henry White had been in the employ of L., and it was claimed that he had authority from L. to indorse these notes. After White had been discharged by L., R. came with these notes to L., who denied his liability. The matter was compromised by a renewal of the notes; two of the renewal notes L. indorsed unconditionally; the third he indorsed without recourse. When this third note came due it was not protested, but was taken up by Williams, he giving, in lieu of it, his note to the

order of R. at three months. *Held*, L. was not liable upon, or by reason of said third note. *Roberts* v. *Leslie*, 76.

What sufficient consideration for firm indorsement of note given for individual debt of partner. See *Rust* v. *Hauselt*, 22.

Liability of indorser who has not received notice of presentment and non-payment, how revived; conditional acquiescence by indorser in charge of such check to his bank account, effect of. See *Van Dyck* v. *Jones*, 538.

Indorser has one day after receipt of notice protest to serve prior indorser. Parol evidence inadmissible to vary indorsement. See *Higgins* v. *Barrowcliff*, 540,

What proof necessary for recovery on note given for accommodation or taken by fraud. See *Nickerson* v. *Ruger*, 571.

BOOKS, PAPERS, AND RECORDS.

See EVIDENCE.

BOUNDARIES.

1. The effect of bounding property conveyed, by, upon, or along (or other equivalent phrase), a highway, waterecourse, or public street, is, that title to the center of the highway, watercourse, or street will pass, unless by the terms of the grant, as interpreted and illustrated by surrounding circumstances, or necessary implication, an intent to exclude the highway or street or bed of the stream is made to appear. *Stevens* v. *Mayor*, 274.

2. In such case, when the land conveyed is described as a certain lot designated on a certain map by a certain number (*e. g.*, 143), and is there bounded on each side by streets laid out on said map, and then gives dimensions which exclude the streets, intent to exclude street is not shown. *Ib.*

3. A coloring, on the map, from which it would seem that the whole street on the north, but no part of the street on the south, was included within lot 143, as laid down on the map, is not sufficient, even when taken in connection with the reference to the map contained, and the dimensions given, in the deed, to show an intent to exclude the street on the south, and, therefore, title passes to the center of that street. *Ib.*

4. When no right to possession in the land appropriated for the purposes of a street thereafter to be opened passed to the contiguous owner until it was closed, and the only purpose and object for which the original grantor could wish to retain any interest in the land so appropriated, was that the street could thereby be actually opened without paying anything to the adjoining owners for the land, which object and purpose wholly ceased upon the street being definitely abandoned as a highway, there is nothing in the situation of the parties showing an intent to exclude the street from the operation of the grant. *Ib.*

5. Where there is no agreement between the parties as to the boundary line, there, although a division line has been actually in existence and the parties have severally occupied according, yet, if such existence and occupation has been for less than twenty years, the fact of their acquiescence in the line as a boundary line must be found to establish it as a boundary line by practical location. *Ib.*

6. A line cannot be practically located by an intention in the minds of parties to locate it in a certain place, when, in fact, they locate it somewhere else. *Ib.*

BREACH OF PEACE.

See POLICE.

BROKERS.

See FACTORS AND BROKERS.

CHATTEL MORTGAGE.

An unfiled chattel mortgage on property subsequently brought by the mortgagor into a firm of which

he becomes a member, as his proportion of the capital, is not invalid as to the other partners by reason of its non-filing. The property comes into the concern impressed with the lien of the mortgage. *Rust* v. *Hauselt*, 22.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

The clerk has no anthority to enter an absolute judgment for interest in an action for the recovery of personal property, where the plaintiff is entitled to a judgment in the alternative for the recovery of the possession of the property, or in default of delivery for the value thereof, the jury having awarded no damages for detention of the property. The interest allowed by section 1,235, Code Civil Procedure, must be added to the sum which plaintiff recovers in case possession cannot be had, and is subject to all the conditions applicable to said principal sum. *Munsell* v. *Flood*, 134.

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COMMON CARRIERS.

See MASTER AND SERVANT; NEGLIGENCE.

CONSTITUTIONAL LAW.

1. The word "property," as used in the constitutional inbibition against taking private property, implies the free use, enjoyment and disposal of all of one's acquisitions without control or direction. From the above definition of property it follows that the polluting the air of one's dwelling with noisome smells which render the enjoyment of life and property uncomfortable, is the taking of property. This, although the smell be not unwholesome. *Caro* v. *Metr., &c. R. R. Co.*, 138.

2. It seems, that unless the legislature have the grounds of the application, showing the necessity and the public use of the private property or lands to be taken, laid before it and incorporated in the act, such act is unconstitutional and void,—*e. g.*, acts of 1839, ch. 246, and 1854, ch. 150. *Carleton* v. *Darcy*, 484.

CONTEMPT.

Where an order dismissing a motion

to punish for contempt in not obeying injunction is reversed by general term, the proper directions to be given are as follows:—Where there is evidence tending to show a violation of the injunction, but the general term is not in possession of all the facts, and the proof before the court is not as full or explicit as it evidently could be made, the proper course to pursue is for the general term to order that an attachment issue against the accused parties, bailable in a sum sufficient to secure his attendance hereafter, that interrogatories be filed and served touching the alleged contempts; that the accused party be required to make written answers thereto, and that it be referred to a referee to examine him on oath, upon the said interrogatories, and to take such further proofs as either party may produce before him touching the alleged contempts, and to ascertain what injury, if any, the plaintiff sustained in consequence thereof, and the extent thereof, and that he report such answers and proofs to the court, with his opinion thereon, and that, upon the coming in of said report, either party may, on eight days' notice, move at special term for the proper order and adjudication thereon, and that for these purposes the case be remitted to the special term. *A. & P. Tel. Co.* v. *B. & O. R. R. Co.*, 377.

When order directing security for alimony and an attachment in case of failure to file, is improper. See *Gane* v. *Gane*, 218.

CONTRACTS.

1. In case of an agreement for contingent compensation, measured by a proportionate part of the fruits resulting from the services to be compensated for, the employer is personally liable when he actually receives the fruits, or when one other than the employer, acting under a power of attorney from the employer, given with the consent of the employee, actually receives such fruits. This, although such person retains in his hands the proportionate part of the fruits which was payable to the employee for his compensation, and does not pay it over to the employer or employee. *Dickenson* v. *Devlin*, 232.

2. A contract was made in April, 1870, by a corporate body, a seminary, to take effect July 1, 1870, for the services of a professor, without specifying the time of its duration. On July 9, 1873 (the professor, in the preceding June, having been informed by a committee appointed at a meeting of the board of trustees, at which a quorum was not present, that the board did not feel justified in employing him for the next year), the chair of the professor was vacated by resolution of the board of trustees, of which the professor had notice July 13. In the month of June, of each year, there was an annual meeting of the board of trustees, at which, as plaintiff well knew, provision was made for carrying on the work of the scholastic year next ensuing, and at which it was customary, as plaintiff also well knew, to select the professors who were to perform duty during the coming year, and to fix their salaries; and it further appeared that it was not until after the completion of these arrangements that the salaries thus fixed as so-called annual salaries commenced to run from July 1 of each year. *Held*, that it might be a question whether the first contract was not one for a definite term, to wit, the next ensuing scholastic year, and whether the continuance of the professorship at the annual meetings in June, 1871, and June, 1872, were not new independent contracts for a definite term, to wit, the scholastic year next ensuing each of said annual meetings; if so, whether any action was necessary on the the part of the trustees to determine the contract of employment, and if any action was necessary, whether the action had in June and July, 1873, did not of themselves have such effect. *Tyng* v. *Theol. Sem.*, 250.

3. In case of a contract where one

is to build a certain wall at the the joint expense of both, and certain other things are to be done at the expense of the other, when the party who was not required so to do, built a wall, but not the one called for by the contract, he cannot call on the other for contributions. The fact that he has built a wall, for the expense of which he cannot call for contributions, does not relieve him from his obligation to pay for the other things which were to be done at his expense. *Scott* v. *Sanford*, 544.

4. In case of a written contract, transferring certain property upon an agreement to apply the same to the payment of certain enumerated claims. *Held*, that a promise to pay any claims not included in the instrument was—1st. If made before the execution of the instrument, merged in it. 2. If made afterwards, without consideration, there being no consideration for the possession, other than the transfer made by the agreement. *Storrs* v. *Flint*, 498.

Novation, doctrine of, illustrated and applied. Ib.

What does not constitute valid contract of agency, by corporation.—See *Felton* v. *McClave*, 53.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

1. The sheriff, under a distress warrant authorizing him to "distrain the goods, &c., of the tenant," having taken the property of a third person, the party who issued the process (the defendant herein), caused the goods to be appraised under the statute (of New Jersey), and subsequently received the proceeds of the sale thereof. *Held*, that the defendant thereby became liable for the conversion of the said chattels. *Bean* v. *Edge*, 455.
2. Where an attachment regularly granted upon competent evidence is vacated upon appeal, for error alone, and not upon the ground of irregularity or for want of jurisdiction,—in the absence of proof of malice upon the part of the party obtaining the process, action will not lie against him for conversion of the goods taken thereunder. *Day* v. *Bach*, 460.

Allegation of ownership is sufficient to support conversion, though the plaintiff sets forth title as mortgagee, and failed to allege default by mortgagor. See *Malcolm* v. *O'Reilly*, 222.

CONVEYANCES.

Acceptance of commissioners' award for land included in assessment, only part of which is required, operates as a conveyance to the city of New York. See *Sherman* v. *Kane*, 310.

See DEEDS.

CORPORATIONS.

When corporation may acquire title by adverse possession. See *Sherman* v. *Kane*, 310.

What not valid contract of agency, by corporation. See *Felton* v. *McClave*, 53.

Corporation may be punished for violation of injunction. See *Atl. & Pac. Tel. Co.* v. *Balt. & O. R. R. Co.*, 377.

Foreign corporation, how brought into court. Ib.

Board of trustees of New York City common schools are quasi corporations, and members cannot be held personally liable for negligence of employees of board, on theory that relation of master and servant exists between them. See *Donovan* v. *McAlpin*, 111.

COSTS AND ALLOWANCES.

1. Costs, as used in the judgment of the court of appeals when ordering judgment absolute for plaintiff, carries to the plaintiff the general costs of the action from the beginning to the end, except such as, subsequent to the decision of the court of appeals, are specially ad-

judged to the defendant. *Rust* v. *Hauselt*, 88.

2. In this case the costs which were specially adjudged to the defendant (which were less than the general costs in the action which were awarded plaintiff) were offset against the general costs, and judgment ordered for the plaintiff for the excess. *Ib.*
3. Where the court of appeals reverses a judgment of the general term in favor of the defendant on his demurrer to the complaint, and orders judgment for the plaintiff on the demurrer, with leave to the defendant to answer, on payment of costs, within a certain time, an extra allowance cannot be granted within that time, so that the same shall become a part of the costs to be paid as a condition precedent to answering. *McDonald* v. *Mallory*, 58.
4. The court, upon adjudging that a fund in the hands of an administrator-defendant which he claims belongs to his decedent, in fact belongs to the plaintiff, and that neither the administrator nor his decedent has any interest therein, cannot direct the payment of the defendant's costs out of such fund. *Sheehan* v. *Huerstel*, 64.
5. It is within the discretion of the court, and is a proper exercise thereof, to deny, as prematurely made, a motion to charge the person beneficially interested in the recovery in an action (2 R. S. 619), with the payment of a judgment for costs entered therein, when an appeal from said judgment is pending at the time said motion is made, though no security upon appeal has been filed, and no stay of proceedings granted. The denial of the motion upon said ground may be deemed equivalent to a stay. *Slauson* v. *Watkins*, 172.
6. A guardian *ad litem* is responsible for costs under the Code of Civil Procedure, but he is not required to file security therefor. *Steinberg* v. *Manh. R'y Co.*, 216.
7. Where the owner of a claim assigns the same to a third party, upon consideration that the said assignee shall begin and prosecute an action thereon, at his own expense, and when the said claim is collected pay to the assignor one half of the amount received over and above all costs, said assignor is beneficially interested in the recovery, under 2 R. S. 619, § 44, and is liable for the costs of the action so brought. This, though he did not retain or appoint the attorney, or furnish funds for the prosecution of said action, or in any way interfere therewith, or direct the progress thereof. *Merceron* v. *Fowler*, 351.
8. Under the provisions of the Code of Civil Procedure, a defendant in an action brought in this court cannot demand security for costs upon the ground that the plaintiff is a non-resident, when the plaintiff resides within this State. *Lewis* v. *Farrell*, 358.
9. Where the defendant neglects for nearly a year to make his motion for security, knowing that the plaintiff resides without the city and county of New York, the action in the meantime having come to issue and been for many months upon the calendar, his delay constitutes such laches as will justify the court, so far as the motion is addressed to its discretion, in denying it upon that ground alone. *Ib.*

Judgment absolute for plaintiff, with costs, by court of appeals, in action for accounting, effect of on defendant's subsequent right to tax costs and disbursements, e. g., referee's fees. See *Rust* v. *Hausell*, 38.

Code Civil Procedure not applicable to order for security for costs made before its passage. See *Wiley* v. *Arnoux*, 575.

COUNTERCLAIM.

When withdrawal of not permitted. See *Whitman* v. *Horton*, 531.

COURTS.

The statutes relating to the jurisdiction of N. Y. Superior Court, reviewed and considered. See *Lewis* v. *Farrell*, 358.

See JURISDICTION.

COVENANTS.

1. The mortgagor of certain premises conveyed the same by a deed containing the following clause: "Which said mortgage the party hereto of the first part hereby assumes and agrees to pay as part of the consideration hereinbefore expressed." *Held*, that this was the covenant of the party of the second part. *Fairchild* v. *Lynch*, 1.
2. Where lands are taken subject to a covenant made between a former owner thereof and the owner of adjacent property, which covenant forbids the use of the premises for "any kind of manufactory, trade or business whatsoever," a change in the character of the neighborhood, *e. g.*, such as that produced by the erection of an elevated railway, which impairs the use of the premises in question for the purposes contemplated by the covenant, but does not affect the remainder of the property bound thereby, does not modify or impair the obligation imposed by the covenant upon the owner of said premises. *Columbia Coll.* v. *Thatcher*, 305.
3. The language of said covenant precludes the carrying on of every kind of business, even though it may be relatively unobjectionable; *e. g.*, the business of a real estate agent. *Ib.*
4. A covenant against use of premises for business purposes, &c., will not be relaxed in favor of one front of the premises, upon the ground that the street which that side of the lot faces partakes of a business character. *Ib.*

Liability of grantee, on covenant to pay mortgage extinguished by purchase of bond and mortgage by grantor and mortgagor. See *Fairchild* v. *Lynch*, 1.

DAMAGES.

A verdict for $15,695.16, held not excessive, in view of plaintiff's personal injuries. See *Schultz* v. *Third Ave. R. R. Co.*, 211.

See SLANDER AND LIBEL.

DEATH, ACTION FOR CAUSING.

It seems, that admissions of the deceased as to the manner in which the accident occurred are competent evidence against his representative in an action brought for causing the death of the deceased. *Lax* v. *Forty-second St., &c. R. R. Co.*, 448.

DEBTOR AND CREDITOR.

A loan was made by R. to L., at his request, upon promissory notes of third parties. Before they matured they were surrendered by R. to W., and in place of them R. took from W. a chattel mortgage on his property (which he afterwards foreclosed), and a policy of insurance on his life, in addition to a previous policy on his (W.'s) life, held by him (R). The loan was originally procured by W., acting as the agent of L., who, it was claimed, as such agent, indorsed the notes to R.; but at the time of the surrender of the notes, W.'s agency and his authority, whatever it may have previously been, had come to an end, The surrendered notes never came to defendant's hands. *Held*, that L. was discharged from liability, whether he be regarded as a loanee or as an indorser. *Roberts* v. *Leslie*, 76.

DEED.

When warranty deed will not estop grantor from obtaining title by adverse possession. See *Sherman* v. *Kane*, 310.

See BOUNDARIES; COVENANTS.

DEFAULT.

Power of General Term to direct entry of order opening. See *Knauer* v. *Globe Ins. Co.*, 370.

DEFENSES.

See PLEADING.

DEFINITIONS.

"*Property*," meaning of, as used in constitutional inhibition against

taking private property, &c. See *Caro* v. *Metr., &c. R. R. Co.*, 138.
"*Inboard*" and "*outboard*," as used in marine insurance. See *Allen* v. *St. Louis Ins. Co.*, 175.

DELIVERY.

When delivery unnecessary to complete sale. See *Gray* v. *Mayor*, 494.

DISCRETION.

When motion to charge real party in interest with costs, will be denied. *Slauson* v. *Watkins*, 172.
Election of causes of action on trial, when compelled. See *Roberts* v. *Leslie*, 76.
Counter-claim, when withdrawal of not allowed. See *Whitman* v. *Horton*, 531.
Amendment of pleading, &c., under section 723, Code Civil Procedure. See *Atl. & Pac. Tel. Co.* v. *Balt. & O. R. R. Co.*, 377; *Hennequin* v. *Clews*, 330.

DIVORCE.

Where the final decree in an action for divorce directs the payment of a certain sum as alimony, but makes no provision in regard to security therefor, an order directing the defendant to pay the alimony, and further providing "that he give security for the future payment of said $600, and in default thereof that an attachment issue punishing defendant as for contempt," is not proper and should be reversed. *Gane* v. *Gane*, 218.
Calendar practice in actions for divorce. See *Compton* v. *Compton*, 579.

EJECTMENT.

It is sufficient to maintain an action of ejectment against the lessee claiming under a void lease, that the plaintiff was in actual possession at the time of entry under the lease; and if in such an action the lessor be allowed to interpose an answer, it cannot defend, if the relation of landlord and tenant is not shown to exist between it and the defendant. *Carleton* v. *Darcy*, 484.

ELEVATED RAILROADS.

See FRANCHISE; INJUNCTIONS.

EQUITY.

Equitable actions, when local and when transitory. See *Atl. & Pac. Tel. Co* v. *Balt. & O. R. R. Co.*, 377.
Broker charged personally with purchase price, rights of, against principal. See *Knapp* v. *Simon*, 225.
Factor may bring action to foreclose lien for general balance, and recover judgment for deficiency. See *Whitman* v. *Horton*, 531.
Constructive fraud in equity; what constitutes. See *Stevens* v. *Mayor*, 274.
Action for deceit, based on actual fraud, when cannot be sustained as equitable action to charge defendant as trustee, with constructive fraud. See *Ib.*
Order on fund due from city of New York operates as equitable assignment. See *Gray* v. *Mayor*, 494.

ESTOPPEL.

A mere payment of taxes and assessments upon land, by one claiming title thereto, will not preclude the true owner from asserting his title, such payment being made without his knowledge. *Stevens* v. *Mayor*, 274.

EVIDENCE.

1. Upon the trial, the action being for the value of goods sold, the sample by which the sale was made was not produced in court, and the evidence as to it was very vague. The plaintiff offered to read from the deposition of plaintiff's agent the answer to the question: "From what sample of wine did you take your order from said Lax?" which answer was excluded. *Held*, error, for which a new trial must be granted. *Sonoma Valley Wine Co.* v. *Lax*, 137.
2. When the testimony of a deceased party to a former action, given in said action, is read upon the trial of a subsequent action by a party thereto (*Code Civil Procedure*, § 830), the case does not fall within the saving clause to section 829 of Code

of Civil Procedure. The said party to the subsequent action is precluded from testifying as to the matters contained in said testimony, so far as specified in said section 829. *Potts* v. *Mayer*, 182.

3. In an action brought by a client against her attorney, to recover moneys alleged to be wrongfully detained by him, the main fact at issue was whether a certain sum of money was paid by her to the attorney in satisfaction of his charges for services, &c., or whether the said sum was delivered to him upon the understanding that part thereof was to be received in full satisfaction of his said charges, and the remainder to be used in settling certain claims which were (as alleged by the client) falsely stated by said attorney to exist. *Held*, error to refuse to charge that the jury might consider the value of the attorney's services, and the disbursements incurred by him for said client, as having a bearing upon the probabilities of the case. *Robbins* v. *Pultze*, 184.

4. Presumptions and admissions cannot be relied on (when they do not operate as an estoppel) to the exclusion of decisive evidence as to the matters to which they relate. *Sherman* v. *Kane*, 310.

5. *It seems*, that admissions of the deceased as to the manner in which the accident occurred are competent evidence against his representative in an action brought for causing the death of the deceased. *Lax* v. *Forty-second Street R. R. Co.*, 448.

6. Records kept at the police station and hospital, showing injuries received by plaintiff from an accident, are not admissible in evidence against him in an action for such injuries, it not appearing that the entries therein were made by persons having knowledge of the facts, or from statements of the plaintiff. *Hoffman* v. *N. Y. C. & H. R. R. R. Co.*, 526.

7. Where plaintiff's books of account have been used in evidence by both parties for several days, and an expert has, by stipulation, made summaries of the entries therein, which were regarded as evidence for the defendant, it is too late for defendant to object to the admission of said books, on the ground that the proper preliminary proof to justify their reception as original evidence, has not been given. *Whitman* v. *Horton*, 531.

8. Books of account in which the book-keeper has made entries upon information from other persons or from other books, cannot be admitted in evidence merely upon his testimony as to their general accuracy. *Ib.*

9. When the person who conducted the business and made the entries in that portion of plaintiff's books which relates to the question in controversy, testifies that such entries are in his handwriting, and are correct; it also appearing that during the period of the transactions involved, accounts were rendered to defendant from time to time, and by him compared with said books, and settlement and correction of any differences made, and that a final account had been rendered to defendant, upon which he had made a payment, and which was treated by all parties as an account stated, the referee's finding agreeing therewith, and with the expert's summary—the admission of such books in evidence without the technical preliminary proof as to their correctness, &c., does not constitute such error as to justify interference with the judgment. *Ib.*

10. The fact that a party declines to comply with a notice to produce, does not make the subsequent admission of a paper offered by such party, substantially differing in its terms from the one called for, although bearing on the same subject matter, error calling for reversal. *Scott* v. *Sanford*, 544.

Admissions of wife as to husband's habits, made in verified petition, are evidence against her in action on policy insuring his life. See *Furness* v. *Met. Life Ins. Co.*, 467.

Exhibition of mutilated limb to jury; when not error. See *Jordan* v. *Bowen*, 355.

Parol evidence not admissible to vary endorsement. See *Higgins* v. *Barrowcliffe*, 540.

Admissions of husband as to purchase, etc., with wife's funds, admissible against heirs. See *Luckey* v. *Odell*, 547.

Value of chattel, what evidence of. See *Armitage* v. *Mace*, 550.

Contributory negligence, testimony susceptible of construction for or against it not sufficient to rebut a presumption of its existence; where such diversity exists in testimony of of single witness, complaint should dismissed. Desmond v. *Rose*, 569.

See PRESUMPTIONS.

EXCEPTIONS.

May be heard on appeal from interlocutory order. See *Hathaway* v. *Russell*, 103.

Referee's report, exceptions to, filed nunc pro tunc. See *Rust* v. *Hauselt*, 23.

Hearing of exceptions at General Term. See *Garner* v. *Mangam*, 365.

See JUDGE'S CHARGE.

EXECUTION.

Sheriff not released from obligation to make return to execution, by fact that prior to return day, he is served with warrant of attachment against plaintiff, granted to defendant as plaintiff in another action; attachment may issue if he neglect so to do. See *Parker* v. *Bradley*, 244.

EXECUTORS AND ADMINISTRATORS.

Costs cannot be directed to be paid to administrator-defendant, out of fund in suit, adjudged to be property of claimant. See *Sheahan* v. *Huerstel*, 64.

See SURROGATE.

EXTINGUISHMENT.

See MORTGAGE.

FACTORS AND BROKERS.

A factor may bring an equitable action to foreclose his lien upon goods of the consignor in his possession for general balance of account, and is entitled therein to judgment for deficiency after the sale of the consigned goods. *Whitman* v. *Horton*, 531.

Broker failing to disclose principal and charged personally with purchase price, rights of, against principal. See *Knapp* v. *Simon*, 225.

Principal and broker; when fiduciary relation exists between; when commissions not recoverable, services rendered by broker being of no value, but mode of transacting business having been left to him. See *Hoffman* v. *Livingston*, 552.

FALSE IMPRISONMENT.

Action against sheriff for arrest made under color of liability as bail, defense in. See *Arteaga* v. *Conner*, 91.

FORMER RECOVERY.

Plaintiff, having been wrongfully discharged from defendant's employment, brought action to recover certain installments of her wages, being all that she would have been entitled to under the contract at the time the action was brought. The complaint was in form for wages, but it appeared upon the face thereof that no services were rendered after plaintiff's discharge. Judgment was taken by default, and was paid in full by defendant. *Held*, that the above recovery exhausted plaintiff's remedy for damages for breach of contract, and is a bar to a subsequent action therefor. *Brodar* v. *Lord*, 205.

FRANCHISE.

A legislative authority to construct an elevated railroad and to operate it by atmospheric power, compressed air or other power, does not authorize it to pollute the air of abutting dwelling-houses with noisome smells or noxious gas, which greatly diminish the enjoyment of the occupation of such houses. Such authority neither directly nor by implication authorizes the infliction of such a grievance. The infliction of such grievance does not appear to be necessary or incident to the exercise

of the corporate authority and power. *Caro* v. *Metr., &c. R. R. Co.*, 138.

FRAUD.

1. A common law action, for deceit, based on actual fraud, in which the allegations of fraud go to the very foundation of the action, and are not simply attached as incidents to the cause of action, cannot be sustained as an equitable action, brought to charge defendant as trustee for plaintiff, on the ground of constructive fraud. *Stevens* v. *Mayor*, 274.
2. The fact that there is difference in the special information of the parties on the subject, will not constitute an element tending to establish constructive fraud in equity, unless there are relations of confidence between the parties or their agents. *Ib.*
3. Haste or surprise, if there is no management or influence to mislead the complaining party, and no pressure brought to bear on him to cause him to act without due deliberation, and the cause is such as that an action cannot be maintained, based solely on mistake, will not constitute an element tending to establish constructive fraud. *Ib.*
4. Inadequacy of consideration, standing alone, does not, under the circumstances appearing in this case, raise a constructive fraud. *Ib.*

GIFT.

Gift, what necessary to constitute; when question for the jury. See *Armitage* v. *Mace*, 550.

GRANTOR AND GRANTEE.

When adverse possession will run in favor of grantor. See *Sherman* v. *Kane*, 310.

GUARDIAN AND WARD.

Guardian ad litem responsible for costs, but not required to file security therefor. *Steinberger* v. *Manh. Ry. Co.*, 216.

Property purchased by husband in his own name, with wife's funds, under agreement with her that title should be taken in joint names—wife may purchase on foreclosure sale, though husband has died leaving children of which she is guardian in socage. See *Lucky* v. *Odell*, 547.

HIGHWAYS.

The principle which makes a person interfering with the safety of the public highway, as such, and for private ends, an insurer of the safety of all persons traveling over the same, who may be injured in consequence of said interference, without fault on their part, cannot be extended to the case of a contractor engaged in taking down a building, there being no excavation or obstruction in the street by reason of said work; and a person injured by material falling from said building cannot recover damages upon the ground of such absolute liability on the part of said contractor. *Eccles* v. *Darragh*, 186.

INJUNCTION.

1. When an act under which a corporation is organized authorizes the taking, by such corporation, of private property for public use, and provides for the making by such corporation of compensation for the property taken by it, and is therefore constitutional, yet where the taking consists in the daily and continuous interference with a naked incorporeal right incident to tangible property, to the diminution of its free enjoyment, *e. g.*, the polluting the air of one's dwelling with noisome smells, which, although not unwholesome, yet render the enjoyment of life and property uncomfortable—and no compensation is made for such interference, and the corporation's want of ability to make reparation is proved or admitted, an injunction may go against the doing or suffering to be done that which causes such interference. *Caro* v. *Metr., &c. R. R. Co.*, 138.

2. Omission to state grounds of injunction is not a jurisdictional defect. It is only an irregularity, for which the injunction may be set aside, and if no substantial right of the defendant has been violated, it may be disregarded or supplied under section 723 Code Civil Procedure. *A. & P. Tel. Co.* v. *B. & O. R. R. Co.*, 377.

3. Where one puts improvements and erections on the land of another under a joint arrangement, one of the details of which is, that the one on whose land the improvements and erections are placed may, at his option, terminate the joint agreement and become the sole owner and possessor of the improvements and erections, upon making compensation therefor, and it appears that the owner of the land is about to take possession and exclusive control without making compensation, and it also appears that the taking of such possession and exclusive control without making compensation at the same time would produce irreparable injury to the other party, a case is presented for the equitable relief of injunction to be exercised by the court having jurisdiction of the subject matter. *Ib.*

4. An injunction will often be granted to restrain a party from deciding for himself a question involving controverted rights, and to compel him to resort to the courts, and this without regard to the absolute merits of the controversy. *Ib.*

5. A corporation may be punished for disobedience of injunction; also all persons bound to obey it who have aided, abetted or countenanced others in violating it. *Ib.*

6. That the injunction is too broad, and restrains the doing of acts which the court has no jurisdiction to restrain, as well as acts over which the court has jurisdiction, is no excuse for the violation of the injunction by the doing of the acts over which there is jurisdiction. *Ib.*

Violation of injunction, practice in proceedings to commit for contempt. See *Ib.*

When courts cannot restrain doing of acts threatened to be done in other States. See *Ib.*

INQUEST.

An application to open an inquest and serve a supplemental answer, setting up a discharge in bankruptcy, will not be granted when it appears that the discharge was obtained pending the action, and that defendant made no motion to amend his answer (though the inquest was not taken till a year after the discharge), and that no motion to open the inquest was made till several years after judgment, no excuse for defendants laches appearing. *Henderson* v. *Savage*, 221.

INSURANCE.

(FIRE.)

Where no objection was made to the form or sufficiency of the proofs of loss furnished by the insured, or to the particularity of their details, and none were suggested at the trial which could not have been readily obviated to the extent of the duty to furnish created by the policy, if it had been suggested that greater minuteness of details was desired; and the company acted on the proofs furnished, and employed an adjuster to adjust the amount of damages, and the adjuster acted with the knowledge and co-operation of the assured, and concluded that the loss exceeded the whole sum insured by all the policies insuring the property; a defense that the proofs of loss were defective is not tenable. *Smith* v. *Exch. F. Ins. Co.*, 543.

(LIFE.)

1. A policy of insurance payable to the wife upon the death of her husband, or upon a certain date, should he then be living, is not assignable by the wife. A guaranty by the wife of the "sufficiency and validity of the assignment" does not give validity thereto; nor does the assignee acquire any interest in the policy by subsequent payment

of premiums in good faith. His rights are limited to the recovery of the amount so paid by him. *De Jonge* v. *Goldsmith*, 131.

2. The presumption that such a policy was issued for the purposes declared in the act of 1840, is not destroyed by proof of a former assignment by the wife for the husband's benefit. Whether such evidence is admissible for that purpose, *quære*. *Ib.*

3. Where the husband, as the agent of his wife, and in her name, obtains a policy of insurance upon his life, warranting the truth of his statement in the application that he is of correct and temperate habits, and making the same a part of the policy, a statement of the wife in a verified petition thereafter made by her in an action for separation, that ever since their marriage he had been addicted to the excessive use of intoxicating liquors, is admissible in evidence against her, in an action on the said policy, and if such admission is not explained or contradicted, a verdict for defendant should be directed. *Furniss* v. *Mut. Life Ins. Co.*, 467.

4. What answer to questions in application will constitute a declaration of correct and temperate habits, and what is sufficient evidence of such habits in deceased, as against an admission such as the above, considered by the court. *Ib.*

(MARINE.)

1. The mere fact of effecting marine insurance, independently of the particular terms used, impliedly warrants that the vessel at the commencement of the voyage is seaworthy. The extent of the warranty is that the material of which the vessel is made, its construction, the qualifications of the captain, the number and description of the crew, the tackle, sails, and rigging, stores, equipment and outfit generally, are such as to render it in every respect fit for, and able to encounter with safety the ordinary perils of the proposed voyage or service. It extends to qualities and defects of the vessel unknown, and that could not have been known, no less than those known, to the assured, and is a condition precedent to the policy attaching, and the burden is on the assured to prove seaworthiness, whether the loss or injury proceeded from a want of it in any particular or not. *Rogers* v. *Sun Mut. Ins. Co.*, 65.

2. The burden of proof as to waiver or modification of warranty as to seaworthiness, rests on assured. Measures taken by the assurer, such as having a survey made to satisfy himself as to the seaworthiness of the vessel, will not of themselves operate as waiver or modification, and the fact that the vessel had been built for sound and inland navigation, that the assurer knew such fact, and that by the policy she was described as "the Steamboat *Novelty*," do not, as matter of law, restrict the implied warranty of general seaworthiness to a limited warranty of seaworthiness for sound and inland navigation. *Ib.*

3. Where the cargo of a vessel is insured, "free from particular average," it is not necessary that there shall be an actual, total, physical loss of the thing insured; it is enough if there be a constructive total loss, *i. e.*, such a destruction of all value as amounts, in consideration of law, to a total loss to the owner. But in such case there must be an abandonment of the goods by the insured, to enable him to recover as for a total loss; and notice of such abandonment must be given, while the whole is in peril, and in a reasonable time; and if the insurers do not accept the abandonment, the owners must hold the property in behalf and for the interest of the insurer. If they hold and use or treat the property as their own, it will amount to a waiver of the abandonment. *Chadsey* v. *Guion*, 118.

4. Plaintiff on insuring signed the open policy in defendant's possession, and was given the usual certificate stating that he was insured "inboard" cargo, &c. The policy provided that the company should not be liable, unless by

special agreement indorsed thereon, for damage to goods on deck; but also provided that it should be lawful for said boats to load in such manner as is customary in such navigation, without regard, &c. While on the voyage a portion of the cargo, laden on deck, was washed overboard and greatly injured. No special agreement permitting lading on deck was proven, but it appeared that the boat was laden according to custom in canal navigation, and that the authorized agent of the company examined her when about to start, and approved the mode of lading. *Held*, that the certificate and policy should be construed together and against defendant, the insurer; that "inboard" is used in contra-distinction to "outboard" and means not projecting over the rail of the vessel; that upon the whole case the conclusion is that the policy attached to the goods which were injured; that in any event the defendant was bound by the approval of its agent. *Allen* v. *St. Louis Ins. Co.*, 175.

5. In an action upon a marine policy, insuring the cargo of a vessel, the insured, in the first instance, need only give general testimony as to the seaworthiness of the vessel, but at the close of the case, the fact of seaworthiness must affirmatively appear in those particulars as to which an attack has been made. *Borland* v. *Merc. Mut. Ins. Co.*, 433.

6. Where it appears that cargo was so laden upon the deck, as to be likely to interfere with the movements of the crew in navigating the vessel, there is a presumption of unseaworthiness, which, if not overcome (by showing affirmatively that the deck cargo was not likely to interfere with the due management of the vessel), will prevent the insured from recovering, though such lading be an act of barratry by the master, and the policy contain a clause insuring against the master's barratry; seaworthiness must exist as a condition precedent to the policy attaching. *Ib.*

7. Under chapter 242 of the Laws 1857, a foreign vessel which leaves the port of New York without a licensed pilot, is presumed to be unseaworthy, and this presumption is not answered by proof that she was safely navigated out of the port. *Ib.*

8. *It seems*, that to constitute barratry of the master, it is enough that the barratrous act was done willfully, and with a knowledge that it was wrong, irrespective of any fraudulent intent on his part. *Ib.*

9. A clause in a marine policy, providing that the insurer is "not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel," comprises leakage from sea perils insured against, as well as ordinary leakage, from whatever receptacle it may occur. Such a clause is not to be deemed an exception from general liability, and where part of the loss was from leakage, the insured must prove the amount and cause thereof, to enable him to recover. *Ib.*

INTEREST.

Action for recovering personal property, interest on verdict, how included in judgment. See *Munsell* v. *Flood*, 134.

Order on fund due from the city of New York, interest on, when accrues. *Gray* v. *Mayor*, 494.

JUDGE'S CHARGE.

1. Where the court erroneously charges the jury, as matter of law, that a certain material fact is as contended by plaintiff, such error is not cured by a subsequent charge, made upon request of defendant's counsel, to the effect that the burden of proof is on plaintiff to show the fact to be as claimed by him, and that on the evidence in the case, it is a question for the jury whether it is so or not, and if they believe such to be the fact, they will find, etc.,—the original charge in that regard not having been withdrawn. *Canfield* v. *Balt. & O. R. R. Co.*, 238.

2. Where an action has been brought by a minor, who becomes of age before the trial, a general exception to the proposition in the judge's charge, that the plaintiff, if entitled to recover, is entitled to compensation for the time during which he had been unable to labor, presents no ground for reversal. *Jordan* v. *Bowen*, 355.
3. A chance expression of opinion as to the credibility of a material witness, made by the judge in his charge, and which he subsequently qualifies by a statement to the effect that the jury are not bound thereby, does not necessarily furnish good ground for exception. *Hoffman* v. *N. Y. C. & H. R. R. Co.*, 526.

JUDGMENT.

1. A judgment will not be sustained on an issue which is not pleaded. *Storrs* v. *Flint*, 498.
2. An order was entered which "adjudged and decreed that it be referred to the same referee to take and state an account," etc., and proceeded to specify in detail the manner in which the accounting should be had. *Held*, that the court did not exceed its powers by "ordering more than a single judgment that defendant account." *Hathaway* v. *Russell*, 103.
3. *It seems*, that so far as the rights of plaintiff are concerned, the above form of judgment is not an adjudication that the reference is to proceed because the defendant is liable to account. *Ib.*
4. Whether the said judgment might have been entered by the clerk, *quaere*. *Ib.*
5. Defendant had lost his right to review the interlocutory judgment by not properly appealing. Motion to open final judgment and allow an answer, on the ground that such right of review had been lost through mistake is denied. *Cameron* v. *Equitable Life Ass. Soc.*, 84.

Appeal from interlocutory judgment, taken after dismissal of appeal from final judgment, when will not lie. See *Cameron* v. *Equitable Ass. Co.*, 84.

Order for judgment in referee's report, what sufficient, under section 1023, *Code Civil Procedure.* See *Hathaway* v. *Russell*, 103.

Exceptions may be heard on appeal from interlocutory judgment. See *Ib.*

Clerk cannot enter absolute judgment for interest in action for recovery personal property, when plaintiff is entitled to alternative judgment. See *Munsell* v. *Flood*, 134.

JURISDICTION.

1. State officers have no jurisdiction over an action against a firm, upon a firm liability, when one or more of the members is a public minister. Non-service of summons on the members who are public ministers, although intentional, will not give jurisdiction over the action. Want of jurisdiction in such cases is to be availed of by petition of the public minister for an order dismissing the complaint. *Matter of Tracy*, 48.
2. Courts of one state or country have no jurisdiction over an action, the cause whereof is in its nature local in another state or country. *A. & P. Tel. Co.* v. *B. & O. R. R. Co.*, 377.
3. Section 427 of Code of Procedure and section 263 of Code of Civil Procedure, providing for actions against foreign corporations, do not give jurisdiction over an action, the cause whereof is in its nature local in another state or country. *Ib.*
4. An action was brought by a domestic corporation against two defendants,—one a domestic corporation and one a foreign corporation, having an office and agency, and doing business in this state,—for an accounting by the foreign corporation, under a contract alleged to exist between it and the plaintiff, to restrain it from an alleged unlawful interference of certain rights claimed by the plaintiff under the alleged contract, which interference consisted in part of threatened acts, which could only be done in another state, and in part of a combination with the other defendant, undertaken to be

consummated in this state, with the view of ousting the plaintiff from its claimed rights and vesting them in such other corporation, and of acts done here directing, or which would result in, the doing of the threatened acts in the other state. *Held*, the courts of this state had no jurisdiction to restrain the doing of the acts threatened to be done in the other state; nor, if they have been done, to compel the undoing of them and the restoration of things to their former condition. The courts of this state, however, have jurisdiction over the action so far as to compel an accounting, and to restrain the doing of the acts threatened to be done in this state. *Ib.*

5. Personal service on president of foreign corporation in the city of New York, of the summons gives jurisdiction, and in such case it is not necessary either that an attachment should have been levied on the property of the corporation, or that the corporation should have property in the State, or that the cause of action should have arisen in the State. *Ib.*

6. *It seems*, that in proceedings for the taking of private property under acts of 1839, ch. 246, and 1834, ch. 250, the supreme court acts as a court of limited jurisdiction, and, to show title thereunder, all the steps prescribed by the statute must be proved to have been taken. *Carleton* v. *Darcy*, 484.

Omission to state grounds of injunction not a jurisdictional defect. See *Atl. & Pac. Tel. Co.* v. *Balt. & O. R. R. Co.*, 377.

Appearance and argument do not confer jurisdiction. See *Newhall* v. *Appleton*, 6.

If question of jurisdiction is waived, it should appear on appeal by recitals in order or in stipulation. See *Ib.*

Bankruptcy court, jurisdiction of, how pleaded. See *Hennequin* v. *Clews*, 330.

Surrogate, when jurisdiction of must be shown, and how. See *Westervelt* v. *Westervelt*, 298.

LACHES.

When motion for security for costs denied on ground of laches. See *Lewis* v. *Farrell*, 358.

Application to open inquest and set up discharge in bankruptcy denied for laches. See *Henderson* v. *Savage*, 221.

LANDLORD AND TENANT.

Although a tenancy begins in the middle of a quarter, yet if by agreement the rent is payable on the quarter days, or payments are in fact so made, then, the year for its continuance will, according to the circumstances, date from the previous or succeeding quarter year; and notice of determination of contract should be for the end of a year commencing at the previous or succeeding quarter day, according to circumstances. What constitutes reasonable notice, considered by the court. *Tyng* v. *Theological Sem.*, 250.

Lessor will not be allowed to come in and defend action of ejectment against lessee, unless relation of landlord and tenant exists between them. See *Carleton* v. *Darcy*, 484.

LEASE.

Execution of lease by city of New York. See *Carleton* v. *Darcy*, 404.

LIMITATION OF ACTIONS.

Action against principal by broker charged with payment of purchase price, when must be brought. See *Knapp* v. *Simon*, 225.

MARRIED WOMAN.

See INSURANCE (LIFE).

MASTER AND SERVANT.

1. It was shown upon the trial that plaintiff was thrown from the defendant's car by the conductor in charge thereof while it was in motion. The court charged that if the conductor "acted neither

maliciously nor with the view to effect some purpose of his own, but within the general scope of his employment, while engaged in defendant's business, and with a view to the furtherance of that business and the defendant's interest, believing, upon the appearance before him, and upon which he had to exercise his judgment, that his duty to defendant required him to act, then the defendant is responsible for the manner in which he acted, and for the consequences of his act, though he may have acted in excess of his authority." *Held*, correct. *Schultz* v. *Third Ave. R. R. Co.*, 211.

2. In case of contract of hiring for an undescribed period, although the contract may take effect immediately on its being made, yet, if the nature of the service to be performed under it is such that the performance of it regularly commences at a certain period of the year and ends at a certain period, no services being performed between the last named period and the recurring first named period in the next year (which circumstances are well known to both parties) the date of the commencement of the year for the running of the contract as one from year to year under the general rule will be the first named period, the time intervening between the making of the contract and such first named period forms no part of such year. Notice of termination of the contract may be for the end of a year commencing at the period when the performance of the service regularly commences. What will constitute reasonable notice, considered by the court. *Tyng* v. *Theological Sem.*, 250.

3. Whether the wrongful act of the servant of a railroad company not inconsistent with the nature of his employment, was done in pursuance of his employment and in the interest of his employers, or wickedly and maliciously out of his own spite, is always a question for the jury; and when the jury find such act to have been done in pursuance of the servant's employment, and to serve the interests of the employer, the employer is liable. *Hoffman* v. *N. Y. C. & H. R. R. Co.*, 526.

4. The above principles applied to a state of facts, showing that plaintiff, a lad eight years of age, being a trespasser on one of the defendant's trains, then moving at the rate of ten miles an hour, was kicked therefrom by one of the defendant's servants, thereby suffering severe injuries; the court holding that there was no distinction in the authorities between the commission of such an act by the conductor and by other servants of the company. *Ib.*

Judgment by default in action, in form for installments of wages to date, after wrongful dismissal of servant, constitutes bar to further recovery on contract of hiring. See *Brodar* v. *Lord*, 205.

Relation of master and servant does not exist between individual member of quasi corporation, and corporation employees. Donovan v. *McAlpin*, 111.

MAXIMS.

Secundum allegata et probata. 45, 519.

Damnum absque injuria. 466.

MIS-TRIAL.

See TRIAL.

MORTGAGE.

Where the grantee covenants to pay a certain mortgage, as part of the consideration of the deed, &c., and his grantor, who is also the mortgagor and obligor, thereafter purchases the said bond and mortgage, the grantee is not liable on his said covenant; this, though the bond and mortgage be subsequently transferred to third parties, and foreclosure proceedings instituted, in which the mortgagor is charged with and pays a deficiency. *Fairchild* v. *Lynch*, 1.

Covenant of party of the first part to assume and pay mortgage, construed to be covenant of party of second part. See *Ib.*

MOTIONS AND ORDERS.

1. Caption does not necessarily make an order a special term one. If it is signed by the judge with his full name, with no directions to enter it, and it is not entered, it is a judge's order, and not a special term order, although it has a caption. *A. & P. Tel. Co.* v. *B. & O. R. R. Co.* 377.
2. Upon a motion to set aside an order for irregularity, the order to show cause must, under rule 37, specify the irregularity, even if it appear in the affidavit. *Garner* v. *Mangam*, 365.

Order denying motion for judgment for sum admitted by answer, appealable. See *Marsh* v. *West, &c. Co.*, 9.

Entry on clerk's minutes, when deemed an order denying motion for new trial. *Dart* v. *Gillies*, 560.

NEGLIGENCE.

1. While the plaintiff, a passenger in one of defendant's ships, was lying in her berth, the tier of berths above suddenly gave way, and tilted down towards her, causing great noise and confusion; immediately after, and before she had recovered self-possession, the steward of the ship pulled her from the berth and tried to set her upon her feet; before she was free from his control and firmly on foot, the ship made a lurch which sent her along the floor, against the door on the other side, and back to the floor, thereby causing her severe injury. The negligence pleaded was the defective construction of the berths. *Held*, that it was the duty of defendant, as a common carrier of passengers, to use the utmost care and foresight in the maintenance and construction of said berths; that the falling of said tier was presumptive evidence of negligence on defendant's part; that from the time of the falling thereof to the time of the injury of plaintiff, there was a continuous and connected series of occurrences induced or caused by the falling, and the plaintiff never having been placed in a position where she must herself bear the risk of the motion of the vessel, having been deprived of her bodily power to protect herself by the act of defendant's agent, the defendant is liable for the injuries so suffered by her. *Smith* v. *British P. Co.*, 87.
2. Where there is a conflict of testimony as to whether the car upon a street railroad was stopped at the request of the deceased, and again negligently started while he was in the act of alighting, the case should go to the jury, notwithstanding that it appears the passenger was unnecessarily upon the front platform, and attempted to alight therefrom. *Lax* v. *Forty-Second R. R. Co.*, 448.
3. A plaintiff's own negligence, or want of ordinary care and caution is not contributory, unless but for such negligence or want of ordinary care and caution, the collision resulting in injury to the plaintiff would not have happened. *Healy* v. *Dry Dock, etc. R. R. Co.*, 473.
4. Where a defendant, after becoming aware of plaintiff's danger by observing the condition and peril of plaintiff, could, by the exercise of reasonable care and prudence, have avoided the collision, the negligence, etc., of the plaintiff is not contributory: in such case, it cannot be said that the collision would not have happened but for the negligence, etc., of plaintiff. *Ib.*
5. The fact that one has placed himself in a place of danger, can never be an excuse for another carelessly or recklessly injuring him. *Ib.*
6. In an action for injuries to the person, caused by the negligence of defendant, it is not error to allow the plaintiff to exhibit to the jury the injured limb; *e. g.*, an arm which has been crushed by machinery. *Jordan* v. *Bowen*, 355.

Liability of master for negligence of servant. See *Shultz* v. *Third Ave. R. R. Co.*, 211; *Hoffman* v. *N. Y. C. & H. R. R. R. Co.*, 527.

Members of quasi corporation, when cannot be held liable for neglect of corporation employees, on ground

that relation of master and servant exists between them. See *Donovan* v. *McAlpin*, 111.

NEW TRIAL.

Section 1,002, Code of Civil Procedure, requires that in a case not specified in the three preceding sections, the motion for a new trial must be heard and determined at special term, in the first instance. A motion on the ground of surprise and newly discovered evidence, must, under said section, be made at special term, and the appearance of the parties before the trial judge, and the argument of the motion on the merits alone, are not acts which confer upon him jurisdiction to hear such a motion. *Newhall* v. *Appleton*, 6.

Entry on clerk's minutes, when deemed order denying motion for new trial. *Dart* v. *Gillies*, 560.

NEW YORK CITY.

1. The several boards of trustees of the common schools of the city of New York, for the respective wards thereof, are, under the statute (*Laws* 1873, c. 112, § 6), official bodies in the nature of corporations. The trustees cannot be held liable in an action against them personally, for the negligence of workmen employed by the board, upon the theory that the relation of master and servant exists between the trustees personally and the said workmen; the board of trustees, as a corporate body is, in such case, the master. *Donovan* v. *McAlpin*, 111.
2. An award by commissioners for land not required for the street, but which is a part of a lot, a portion of which was required, and which the commissioners deem it expedient to include in their estimate and assessment, and the acceptance of such award operate as a conveyance of the land to, and vest the title in, the corporation of the city of New York. *Sherman* v. *Kane*, 310.
3. A lease of lands (the title to which the city of New York claims under chapter 246 of Laws of 1839, and chapter 150 of Laws of 1834), purporting to be made by the "mayor, aldermen, &c., acting by the commissioners of the sinking fund," as lessor, and which is signed by the comptroller with his name and official title, is improperly executed and void. *Carleton* v. *Darcy*, 484.
4. An order drawn by one upon a fund due him from the city of New York, operates as an equitable assignment of the sum therein named, and the drawee is the real party in interest as to the city, although the contract under which the fund was earned provides that none of the moneys payable thereunder shall be assigned without the assent of the commissioner of public works, which consent is not obtained; and though, after the order is presented, and before payment thereof, the drawer forbids the city to pay it. Interest accrues upon such an order from the time it becomes due and payable. *Gray* v. *Mayor*, 494.

NOTICE.

What constitutes reasonable notice to quit, and of termination of contract for services. See *Tyng* v. *Theo. Sem.*, 250.

Reasonable notice, when question of law for court. See *Ib.*

NOTICE TO PRODUCE.

See EVIDENCE.

ORDERS.

See MOTIONS and ORDERS.

PARTITION.

Right of receiver in supplementary proceedings to maintain action for partition. See *Miller* v. *Levy*, 209.

PARTNERSHIP.

1. Surrender of chattel mortgage on individual property, brought by the mortgagor into the firm, subject to the incumbrance, consti-

tutes a valuable consideration for the firm's indorsement of notes given, on the surrender of the mortgage by the mortgagor, for his individual debt secured thereby. *Rust* v. *Hauselt*, 22.

2. Where one partner, without the assent or knowledge of his copartner, gives to H. his own notes, with the firm name indorsed thereon by him, in payment for his individual debt, which is secured by a chattel mortgage made by him on his individual property, which property, subject to the mortgage, he had brought into the copartnership as his proportion of the capital, H. at the same time surrendering his chattel mortgage, and thereafter there is a transaction between the firm and H. as to some wire gauze, and thereafter the firm makes an assignment to H. for the benefit of creditors, and in the schedule of liabilities annexed thereto, states its indebtedness to H. to be $3,000; and upon the evidence it appeared that there could not be so large a claim in favor of H., except upon the basis that the firm acknowledged its liability on the said indorsements; and it also appeared that upon that basis the claim in favor of H. would be much larger, unless the firm had received a credit in respect of the wire gauze; and H. testifies as follows:—"Q. In Ex. 1," being the schedule of indebtedness, "the firm indebtedness to you is stated at $3,000; state how that amount was arrived at? A. They owed me $6,000, and after deducting the wire gauze, they agreed that the balance should be $3,000. I accepted the assignment upon the schedule of liabilities handed me by Rancke & Rust, which included my debt at $3,000." *Held*, a ratification of the act of the partner who gave the firm indorsement for his individual debt, and an adoption by the firm of the original claim against the individual partner as a firm obligation. *Ib.*

3. In an action for an accounting, by one of the partners, against his copartner and assignee, the result of above holding as to ratification, is that, as between the parties to the action the assignee is entitled to charge against the assets of the firm said sum of $3,000, and is under no obligation to account for the proceeds or value of the gauze as part of the assigned estate. *Ib.*

4. *It seems*, that an accounting may be had for the purpose of adjusting the accounts of a copartnership, as between the partners, though the complaint fails to show whether there are outstanding claims due to or from the firm, or whether there is property owned by the firm. *Kuehnemundt* v. *Haar*, 188.

5. In an action for such an accounting, where the complaint shows that an assignment for the benefit of creditors has been made by the firm, the complaint will be held insufficient on demurrer. The cause of action for such sums as may have been withdrawn in excess by any of the partners is in the firm, and passes as an asset by the assignment. *Ib.*

6. A. and B. entered into an agreement by which A. was to lend to B. $50,000, (upon certain real estate) to be used by B. in building houses thereon. For this B. was to pay A. interest and one-half of the profits of the houses, when sold, which it was stipulated should not be less than $12,500; the whole loan, interest, and profits to be secured by bond and mortgage on the premises, A. to take new second mortgages for his loan and profits, whenever B. should be ready to obtain a prior loan on the premises, to be paid off when the houses were sold. *Held*, a partnership was not established, even as to third parties. *Curry* v. *Fowler*, 195.

Assignee in bankruptcy of partner, when petition of, to be allowed to come in, etc., after judgment in action for dissolution and for damages, denied. See *Keck* v. *Werder*, 340.

Chattel mortgage on property subsequently brought by mortgagors into firm, as capital, not invalid as to other partners for non-filing. See *Rust* v. *Hauselt*, 22.

Successorship in business, and consequent right to use of old firm name, trade-marks and labels, what suffi-

cient evidence of. See *Hazard* v. *Caswell*, 559.

PARTY WALL.

Construction of contract for party wall. See *Scott* v. *Sanford*, 544.

PAYMENT.

See PLEADING.

PLEADING.

1. Defendant is not precluded by subdivision 2, section 149, of the Code of Procedure (*Code Civ. Pro.* § 500, subd. 2), from resting upon a defense in the nature of matter of avoidance, which is not set up in the answer, when the facts upon which the defense is based are stated in the complaint. *Fairchild* v. *Lynch*, 1.
2. An answer admitting a certain sum to be due by defendant, but alleging as a reason for non-payment that a third party has attached the indebtedness in an action against plaintiff, that said action "has since been pending," and that the defendant has never been released from its obligations by reason of such levy, is insufficient, and does not constitute a bar to the recovery of the amount, on motion, under section 511, Code of Civil Procedure. The answer should state that the said attachment and levy are still in force. *Marsh* v. *West, &c. Co.*, 8.
3. When the answer contains only new matter constituting a defense by way of avoidance, a reply put in without the direction of the court is irregular, and should be stricken out. Sections 516 and 517 of the Code of Civil Procedure should be construed together. *Dillon* v. *Sixth Ave. R. R. Co.*, 21.
4. Where, by the complaint in an action against the sheriff, for wrongfully taking and converting certain chattels, it appears that plaintiff claimed title to the property as mortgagee under a chattel mortgage, in the form of a bill of sale, with condition that on payment of a certain sum on demand it should be void, mortgagor to remain in possession until default, &c.; an allegation that the plaintiff was the owner of the chattels in question is sufficient to sustain the action, without any averment of default on the part of the mortgagor. *Malcolm* v. *O'Reilly*, 222.
5. A complaint, which sets out the original agreement for compensation, the performance of service under it, and that the fruits resulting from the services had been received by one whom the defendant, with the knowledge and consent of the plaintiff, has authorized to receive the same, and that neither such person nor defendant has paid to plaintiff the proportionate part of such fruits payable to him—states a good cause of action. Further allegations as to the disposition made by such person of the fund received by him, as to a demand made on him by the plaintiff for a part of the fund and a refusal by him to pay, on the ground of a direction given to him by defendant not to pay, as to a notification given to such person by defendant not to pay, and as to defendant's claiming the whole fund, and denying the right of the plaintiff to any portion thereof, may all be treated as surplusage, and under a general denial plaintiff is not put to proof of them. Under a general denial, an affirmative defense cannot be interposed. *Dickenson* v. *Devlin*, 282.
6. An agreement between employer and employee, that the employee's personal liability should be discharged by the transfer by the employer to the employee of the employer's right to the fund in the third person's hands, to the extent of the employee's proportionate part thereof, is an affirmative defense, and must be pleaded. Payment by such third person to the employee is an affirmative defense and must be pleaded. *Ib.*
7. An answer alleged that defendants, on petition of certain of their creditors, were duly adjudged bankrupts under the laws of the United States, and such proceedings were thereafter had that a trustee was duly elected and appointed, having certain persons for his committee; the supplemental answer alleged that in

pursuance of the bankruptcy proceedings, mentioned in the original answer, the district court of the United States, for the Southern District, sitting as a court of bankruptcy, had (since the service of the original answer) granted to the defendants certificates of discharge under the seal of said court. *Held*, a sufficient averment of jurisdiction. *Hennequin* v. *Clews*, 330.

8. An answer is insufficient which omits to aver that the claim or indebtedness sued on was one provable in bankruptcy, and which would be extinguished by a discharge in bankruptcy, and was not one which was exempt from the operation of the bankruptcy statutes. *Ib.*

9. Although an answer is defective in these particulars, yet, if it has been tacitly treated as sufficient for a long time—say four years—and proceedings and adjudications, with the answer before the court, have been had and made, affecting the merits of the defense of a discharge, the objection becomes a purely technical one, and should be relieved against under section 723 Code of Civil Procedure. *Ib.*

False representations, how alleged; failure to allege properly, when waived. See *Furlong* v. *Gair*, 573.

POLICE.

A police officer, or other known conservator of the peace, may lawfully interpose to prevent a breach of the peace, and so long as there remains any danger of it, the duty of interference continues. He has the right to remonstrate against noise and disturbance in the street, and if an assault upon him be attempted for so doing, he may arrest the offender. What constitutes a breach of the peace, also the general rights and duties of police officers in making arrests—considered by the court. *McIntyre* v. *Raduns*, 123.

POSSESSION.

Possession sufficient to maintain ejectment. See *Carleton* v. *Darcy*, 484.

PRACTICE.

1. By force of rule 30, itself, the report upon a reference other than of issues, becomes absolute and confirmed, unless exceptions thereto are filed and served within eight days after service of notice of filing the report. No order of confirmation, either upon motion or ex parte, is necessary. So held as to a reference to take and state an account. If, notwithstanding no exceptions are filed, a motion is made to confirm, which after opposition is granted, an appeal from the order of confirmation entered thereon brings up nothing for review. Although, after a motion to confirm has been heard and granted, exceptions are filed *nunc pro tunc*, yet no benefit can result therefrom on appeal from the order of confirmation. To obtain any benefit therefrom there must be a rehearing of the motion upon the exceptions. If such rehearing is had after an appeal from the original order, it would involve an abandonment of the appeal. The court has power to permit the filing of exceptions *nunc pro tunc*, and to that end may make such disposition of an appeal from an order confirming a report to which no exceptions were filed, as may be necessary to prevent a failure of justice. *Rust* v. *Hauselt*, 22.

2. When a complaint contains two causes of action, resting upon substantially the same facts, in one of which the defendant is sought to be made liable in one character, and in the other in another character, a case is presented where a motion, made at the trial to compel an election, should be granted. As the granting or denying the motion rests, to a large extent, in the discretion of the trial judge, a new trial will not be granted for a particular exercise of that discretion, unless it clearly appears that the appellant was materially prejudiced by it. When defendant will be deemed so prejudiced, considered by the court. *Roberts* v. *Leslie*, 76.

3. When judgment of affirmance is rendered by the general term, it is the duty of the respondent to prepare and file a proper judgment-

roll, based upon the said decision, and the appellant has a right to insist upon the performance of that duty. This is so, though the appellant has failed to file the printed case and exceptions as settled under rule 35, the point not having been raised at the argument of the appeal, and the proposed case, proposed amendments and settlement of the judge having been filed. *Knapp* v. *Roche*, 200.

4. Where leave had been obtained to serve a supplemental answer and it had been served and accepted, but no formal order was entered, which was not discovered until years after, when the cause was about to be tried, whereupon a stipulation was entered into, whereby it was stipulated "that an order be entered, and that no other or further or amended answer be allowed to be served, and no other delay shall ensue by reason thereof." *Held*, that the above indicated portion of the stipulation was intended as a provision against a further delay of the trial, and not as a limitation of the power of the trial judge to grant an amendment, as he is expressly authorized by the Code to allow on the trial, in furtherance of justice. This, though an order embodying the terms of the stipulation has been entered. *Hennequin* v. *Clews*, 330.

5. Upon a motion to set aside an order for irregularity, the order to show cause must, under rule 37, specify the irregularity, even if it appear in the affidavit. *Garner* v. *Mangam*, 365.

6. Want of jurisdiction of person of public minister, is to be availed of by petition of the public minister for an order dismissing the complaint. *Matter of Tracy*, 48.

Interlocutory judgment that an account be had and referring action to referee, etc., whether same may be entered by clerk. See *Hathaway* v. *Russell*, 103.

When appeal from interlocutory judgment must be taken. See *Cameron* v. *Eq. Ass. Co.*, 84.

Exceptions may be heard on appeal from interlocutory judgment. See *Hathaway* v. *Russell*, 103.

Withdrawal of appeal, practice upon. See *Weinman* v. *Dilger*, 101.

Appeal from order reference, when right of waived. See *Egbert* v. *O'Connor*, 194.

New trial, motion for, where should be made. See *Newhall* v. *Appleton*, 6.

Reply, when may be stricken out as unauthorized. See *Dillon* v. *Sixth Ave. R. R. Co.*, 21.

See ACCOUNTING; AMENDMENTS; BANKRUPTCY; BILL OF PARTICULARS; CLAIM AND DELIVERY; CONTEMPT; COSTS; COUNTERCLAIM; DIVORCE; STAY OF PROCEEDINGS; TRIAL.

PRESUMPTIONS.

Origin of title by adverse possession, presumption as to. See *Sherman* v. *Kane*, 310.

Unseaworthiness, presumption as to. See *Borland* v. *Mer. M. Ins. Co.*, 433.

Policy of insurance payable to wife, presumption that same is issued under Act 1840. See *De Jonge* v. *Goldsmith*, 131.

Compromise verdict, presumption as to rendition of. See *Meyer* v. *Press Pub. Co.*, 127.

See NEGLIGENCE.

PRINCIPAL AND AGENT.

See AGENCY.

PROCESS.

Liability for conversion of goods taken under process. See *Bean* v. *Edgar*, 455; *Day* v. *Bach*, 460.

PROPERTY.

Meaning of word "property," as used in constitutional inhibition against taking private property. See *Caro* v. *Metr. &c. R. R. Co.*, 138.

Taking of private property for public use. See *Carleton* v. *Darcy*, 484.

RAILROADS.

The provisions of the act of April 2, 1850, in relation to the liability of railroad companies for injuries to passengers while on the platform, etc., does not apply to street rail-

road companies. *Lax* v. *Forty-second Street R. R. Co.*, 448.

Legislative authority to construct elevated railroad and operate it by atmospheric power, compressed air, or other power, does not authorize it to pollute the air with smell or gas. See *Caro* v. *Metr., &c. R. R. Co.*, 138.

See MASTER AND SERVANT; NEGLIGENCE.

REAL ESTATE.

See ADVERSE POSSESSION; BOUNDARIES; CONVEYANCES; COVENANTS; DEED; EJECTMENT; GRANTOR AND GRANTEE.

RECEIVER.

1. The plaintiff, a receiver in proceedings supplementary to execution, to whom the judgment-debtor had conveyed his interest in certain real estate, devised by the will of his father to executors, in trust for specified purposes, commenced this action for partition of the premises in question, and was appointed receiver of the rents, &c., therein. It appearing that the said executors, the defendants herein, were wholly responsible; that they had duly accounted before the surrogate; that two years had elapsed since the commencement of this action and a hearing thereof had not been had; and that increased expense would be caused by such additional administration of the trust estate—the order appointing plaintiff receiver was reversed. *Miller* v. *Levy*, 207.
2. *It seems*, that a receiver in supplementary proceedings, to whom the judgment-debtor has conveyed his interest in real property, cannot, as such, maintain action for partition thereof. *Ib.*
3. It is not necessary that the receiver *pendente lite* of a corporation should be substituted as defendant in an independent action brought against the corporation prior to his appointment, in order to enable the plaintiff therein to proceed to judgment. *Knauer* v. *Globe Mut. L. Ins. Co.*, 370.
4. In this case the court held that the default should be opened as matter of favor, the receiver having been guilty of no laches. *Ib.*

REFERENCE.

A conclusion of law in a referee's report in an action for an accounting, "that defendant should be ordered and adjudged to account," is a sufficient order for judgment by the referee, as required by section 1022, Code of Civil Procedure. *Hathaway* v. *Russell*, 103.

Judgment absolute for plaintiff, with costs, by court of appeals, in action for accounting, effect of on defendant's right to tax referee's fees and enter judgment for balance found due him on reference under such order of court of appeals. See *Rust* v. *Hauselt*, 88.

Allowance of amendment of pleading, made in the findings of the referee, when deemed in time. See *Bean* v. *Edge*, 455.

See PRACTICE.

REPLY.

When may be stricken out as unauthorized. See *Dillon* v. *Sixth Ave. R. R. Co.*, 21.

RES ADJUDICATA.

What constitutes res adjudicata, and how a party may avail himself thereof. See *Westervelt* v. *Westervelt*, 298.

REVERSAL.

Where an action is brought for an accounting, and judgment is rendered dismissing the complaint on the ground that there has been an accounting by the defendant, which is binding and conclusive on the plaintiff, and adjudges that defendant recover for the amount found due him on such accounting, the effect of a reversal of such judgment is that upon these facts appearing upon the trial, the plaintiff was entitled to an accounting, and to the payment of such sum as on such accounting he might be found entitled to. *Rust* v. *Hauselt*, 22.

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SALE.

1. B., the lessee of certain premises, sub-let the same for the unexpired term, together with certain of his chattels thereon, by a lease providing as follows: that on performance of covenants and payment of rent (a large part of which was paid in advance by indorsed notes), B. would, at the expiration of the term, convey said chattels to the sub-tenant; that if a loss by fire occurred, B. was to receive out of the insurance money (the sub-tenant agreeing to keep the chattels insured), such proportion as the rent then due might bear to the whole rent, the balance to go to the sub-tenant; that upon default, re-entry could be made, and the chattels sold, and the rent due taken from the proceeds, the balance to go to the sub-tenant. *Held*, that under the above agreement, B. did not part with title to the chattels; als . that a sale thereof by B. during the tenancy, unaccompanied by manual delivory, raised no presumption of fraud. *Bean* v. *Edge*, 455.
2. Where the price of certain specific chattels is fixed, and paid, *e. g.*, by orders upon a fund due the vendee from the city of New York, and delivery is to be made at a place designated by the vendee, nothing else remaining to be done by the vendor, the title passes absolutely without delivery. *Gray* v. *Mayor*, 494.

Sale of agent's interest in agency for term of years, existence of valid contract making vendor agent for the term, necessary to recovery of purchase money. See *Felton* v. *McClave*, 53.

Action by vendor against assignee of vendee to replevy goods sold: effect of compromise therein: when not bar to recovery of purchase price from vendee. See *Talcott* v. *Brouner*, 566.

SCHOOL TRUSTEES.

See NEW YORK CITY.

SECURITY FOR COSTS.

See COSTS.

SHERIFF.

The sheriff is not relieved from his obligation to make return of his proceedings upon an execution against the property of defendant, by the fact that prior to the return day thereof he was served with a warrant of attachment against the plaintiff, granted upon the application of defendant as plaintiff in another action. If he neglects to return the execution, he is liable to be proceeded against by attachment, and it is no defense that he has not been ruled or notified to make a return. Return can be made according to the facts, and if a sufficient excuse in law for not paying the money is presented, under the principles of Wehle *v.*

Conner (69 *N. Y.* 546), and Dunlop *v.* Paterson Fire Ins. Co. (74 *N. Y.* 145), the court will not compel the sheriff to pay over. *Parker* v. *Bradley*, 244.

Liability of sheriff as bail, and right to re-arrest defendant. See *Arteaga* v. *Conner*, 91.

SLANDER AND LIBEL.

The rule as to damages in actions for libel stated by the court, and a verdict of $1,375.03, held not excessive, as actual damages to plaintiff in her business as midwife, from a libelous writing in regard to her said business, printed and published in a newspaper in New York city, where a retraction of the charge made was published in the same newspaper two days thereafter, no evidence of damage being before the jury. In such case, the question of malice, in its bearing upon the right to exemplary damages, should not be taken from the jury. *Meyer* v. *Press Pub. Co.*, 127.

SPECIFIC PERFORMANCE.

The plaintiff, as a subscriber with others, at the request of defendant, advanced a sum of money to the latter by payment to his agent, to be used for a specific purpose, viz. : in the purchase of a certain amount of stock and bonds of the Silver Islet Mining Company, for said subscribers, the plaintiff to receive a specified amount thereof. *Held*, in an action to compel the specific performance of an alleged contract to sell and deliver to plaintiff his said share of the securities in question, that upon the evidence, it appears that a trust was created, involving an obligation to use the funds for the purpose for which they were subscribed, which obligation the defendant cannot avoid by showing that he chose to use his own funds and purchase for himself; that the transaction is not avoided by the statute of frauds, and that the plaintiff is entitled to have from the stock and bonds in question the portion which fell to him, according to his subscription. *Johnson* v. *Brooks*, 13.

STATUTE OF FRAUDS.

See SPECIFIC PERFORMANCE.

STAY OF PROCEEDINGS.

Denial, as prematurely made, of motion to charge party beneficially interested with costs, when operates as stay of proceedings pending appeal, though no security be filed. See *Slauson* v. *Watkins*, 172.

SUMMONS.

Where a party legitimately and voluntarily comes within the territorial jurisdiction of the court, not having been induced to do so by fraud, trick or device, the fact that access to him is by such means obtained furnishes no ground for setting aside the service of the summons. *A. & P. Tel. Co.* v. *B. & O. R. R. Co.*, 377.

An exhaustive summary of common law and statutory provisions relative to bringing parties into court. See *Ib.*

SUPERIOR COURT.

See COURTS.

SUPPLEMENTARY PROCEEDINGS.

After the defendant has appeared and been examined in proceedings supplementary to execution, without objection, he is not in a position to justify himself when proceeded against for contempt in violating the order restraining him from disposing of his property, by allegations of informalities in the affidavit upon which the proceedings were based, nor to claim that the jurisdiction to which he has submitted, is avoided by such informalities; *a fortiori*, this is so when the defendant is an officer of the court. In this case, held that the acts of de defendant did not of themselve cause the loss to plaintiffs com

plained of, and therefore, that defendant should not be fined the full amount of the judgment, etc., as claimed by the plaintiffs. *Lehmaier* v. *Griscold*, 11.

See RECEIVER.

SURROGATE.

The action was brought by plaintiff as administrator, to recover certain moneys deposited in a savings bank in the name of defendant as trustee, for plaintiff's intestate. *Held*, that an order of the surrogate, under chapter 394, Laws 1870, deciding that said administrator, by virtue of his office as such, was entitled to the custody of the bank-book, was not an adjudication of his title to the funds represented thereby; also held, that the surrogate had no jurisdiction to try such a claim, and that the defect was not waived by the appearance of the parties. *Westervelt* v. *Westervelt*, 298.

Jurisdiction of surrogate, when must be shown and how. See *Ib.*

TAXES AND ASSESSMENTS.

Effect of owner's acceptance of commissioner's award for land upon title thereto. See *Sherman* v. *Kane*, 310.

TRADEMARKS AND LABELS.

"Rye and rock" cannot be appropriated as trademark. Van Biel v. *Prescott*, 542.

Successorship in business, and consequent right to use of old firm name, trademarks and labels; what sufficient evidence of. See *Hazard* v. *Cascell*, 559.

TRIAL.

1. In this case the judge upon the trial, after the parties had rested, stated that if the plaintiff would stipulate to make and print a case for the general term, and that, in case of his failure there to maintain his verdict, a verdict should be entered for defendant, he would direct a verdict for the plaintiff, and order the exceptions to be heard in the first instance at general term. The required stipulation being given, a verdict was thereupon, by consent of counsel for both parties, directed for the plaintiff, and the exceptions ordered to be heard in the first instance at general term. *Held*, that in the absence of an exception to the direction of a verdict, defendant can have no relief from the general term, other than a new trial, upon the ground that there was a mistrial; that the foregoing arrangement was a confounding of the two remedies by which the proceedings upon a jury trial can be reviewed in the first instance at general term, before judgment. *Westervelt* v. *Westervelt*, 298.
2. In an action for injuries to the person, caused by the negligence of defendant, it is not error to allow the plaintiff to exhibit to the jury the injured limb; *e. g.*, an arm which has been crushed by machinery. *Jordan* v. *Bowen*, 355.
3. It is not irregularity for the trial judge at the same time that he denies defendant's motion for a new trial on the minutes, to order the exceptions to be heard in the first instance at general term, there being but one motion, viz.: for a new trial. *Garner* v. *Mangam*, 365.
4. *It seems*, that a motion that the exceptions be heard in the first instance at general term, may be made after the denial of a prior motion for a new trial on the minutes upon exceptions. *Ib.*
5. Agreement of counsel on the trial as to amount of cargo jettisoned is binding on the parties. *Borland* v. *Merc. Mut. Ins. Co.*, 438.
6. Where the defendant has set up a counter-claim, based on transactions directly involved in the accounting for which the action is brought, the court is justified in refusing to allow defendant to withdraw it at the close of the testimony. *Whitman* v. *Horton*, 531.
7. Amendment at trial, which substantially changes a claim or defense cannot be allowed. A change from an action on the case

to one on express contract is a substantial change. *Storrs* v. *Flint*, 498.

Allowance of amendment asked for on the trial, made in the findings of the referee, when deemed in time. See *Bean* v. *Edge*, 455.

Right of court to allow amendment on trial, when not limited by prior stipulation that "no other, further or amended answer be served," etc. See *Hennequin* v. *Clews*, 330.

Election of causes of action where complaint has double aspect. See *Roberts* v. *Leslie*, 76.

See JUDGE'S CHARGE; VERDICT.

TRUSTS AND TRUSTEES.

Trust to carry on business theretofore carried on by the creator of the trusts, pay certain debts of the creator, and turn over the property; powers of such trustee to issue negotiable or commercial paper and to make debts or borrow money. See *Storrs* v. *Flint*, 498.

Property purchased by husband in his own name, with wife's funds, under agreement with her that title should be taken in joint names—wife may purchase on foreclosure sale, though husband has died leaving children of which she is guardian socage. See *Lucky* v. *Odell*, 547.

See SPECIFIC PERFORMANCE.

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VERDICT.

1. There is no presumption that individual jurors have compromised their opinions in arriving at the amount of a verdict in an action for libel where there is no evidence as to damages, from the mere fact that the verdict is for a certain number of dollars and three cents. *Meyer* v. *Press Pub. Co.*, 127.
2. The complaint stated three separate causes of action, after each of which were the words "to his damage ten thousand dollars," and closed with a prayer for judgment in the sum of $20,000. *Held*, that a verdict of $15,000 is not irreconcilable with said pleading. *Schultz* v. *Third Ave. R. R. Co.*, 211.
3. At the trial, the action being on the case, proof of an express promise was admitted, the judge stating that an amendment might be made if necessary. No amendment was in fact made. Verdict for plaintiff. *Held*, the verdict could not be sustained on the ground of an express promise, because it was not *secundum allegata*. *Storrs* v. *Flint*, 498.

WAIVER.

Implied warranty of seaworthiness in marine insurance, waiver of. See *Rogers* v. *Sun Mut. Ins. Co.*, 65.

Abandonment of vessel by assured, waiver of. See *Chadsey* v. *Guion*, 118.

Defective proof of loss, waiver of. See *Smith* v. *Exch. Fire Ins. Co.*, 543.

Defective pleading, waiver of. See *Hennequin* v. *Clews*, 330; *Furlong* v. *Gair*, 578.

WARRANTY.

See INSURANCE (MARINE).

WITNESS.

1. Where the plaintiff voluntarily calls the defendant as a witness, as to matters not merely formal—upon a motion for a dismissal of the complaint, the judge is bound to consider him a credible witness as to the facts testified to by him, whether upon the direct or upon the cross-examination. *Branch* v. *Levy*, 428.
2. *It seems*, that in such case defendant must be held credible as against the plaintiff, even as to matters testified to by him when subsequently called by the defense. *Ib.*

When precluded from testifying under section 829 Code Civil Procedure. See *Potts* v. *Mayer*, 182.

See JUDGE'S CHARGE.

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